Plaintiff testified that his pain increased when stressed. Tr. 48. Plaintiff also testified that he experienced toe pain from gout. Tr. 48. He wrote in his function report that his hands did not work at times and he dropped items about twice a day. Tr. 331. Plaintiff testified that he was obese, weighing over 300 pounds while having a height of 6 feet, 2 inches. Tr. 60. He testified that he had experienced hypoglycemia, that could be triggered by the weather, food, or stress. Tr. 49. Plaintiff testified that his fatigue increased in hot weather. Tr. 49. He said that with cold weather he experienced getting pleurisy in his lungs and felt his trachea start closing. Tr. 49. He testified that he had a thyroid issue that he managed with medication. Tr. 50.

Plaintiff testified that he experienced dizziness, difficulty talking, difficulty focusing, lack of awareness, anxiety, and agitation every morning. Tr. 46, 324. In his function report, Plaintiff wrote that he experienced inconsistent sleep, tiredness, and limited mental energy. Tr. 324. Plaintiff also testified that he felt anxiety regarding social interactions and in enclosed spaces. Tr. 50-51. Plaintiff testified that he avoided situations that could cause him flashbacks due to PTSD. Tr. 51. He testified that these issues seemed to worsen each year. Tr. 58.

The ALJ rejected Plaintiff's subjective symptom testimony. Tr. 22. The Commissioner argues that the ALJ supplied two valid rationales for doing so: (1) inconsistencies with his activities of daily living and (2) inconsistencies with the medical record.

A. Activities of Daily Living

The Commissioner contends the ALJ properly rejected Plaintiff's testimony based upon his activities of daily living. Def.'s Br. 4, ECF No. 19. Activities of daily living can form the basis for an ALJ to discount a claimant's testimony in two ways: (1) where the activities contradict a claimant's testimony; or (2) as evidence a claimant can work if the activities "meet the threshold for transferable work skills." *Orn*, 495 F.3d at 639. A claimant, however, need not

be utterly incapacitated to receive disability benefits, and sporadic completion of minimal activities is insufficient to support a negative credibility finding. *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001); *see also Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (requiring the level of activity to be inconsistent with the claimant's alleged limitations to be relevant to her credibility).

The Commissioner asserts that Plaintiff's ability to attend graduate school with accommodations, perform basic household chores, attempts to complete tasks outside such as gardening roses, shop for groceries, and handle money conflict with Plaintiff's testimony. Def.'s Br. 4–5. The Commissioner also cited Plaintiff's reported desire to spend more time with friends and his wish to fish in state parks as contradicting Plaintiff's subjective symptom testimony. *Id.* These activities, however, were insufficient to reject Plaintiff's testimony for multiple reasons.

First, the activities the ALJ summarized do not conflict with Plaintiff's testimony. For example, although the ALJ cited Plaintiff's ability to attend graduate school, Plaintiff explained that he was attending with accommodations and quit schooling due to increasing hand pain. Tr. 52-53 ("I stopped . . . . I couldn't even take my final because that's when I couldn't even . . . write for 30 seconds or so before my hands just burn"). On his ability to drive, Plaintiff explained that he could drive only after the first three hours after waking up, otherwise he would go through red lights or almost hit pedestrians. Tr. 46. Plaintiff had indicated to Dr. Scharf that he shopped quickly at the grocery due to increasing pain when standing. Tr. 787. Plaintiff reported to Dr. Scharf that he could only do laundry and vacuuming about twice a month. Tr. 787. Plaintiff testified at the hearing that he alternates between periods of rest and work in order to complete his household tasks. Tr. 47, 49.

The Ninth Circuit has consistently held that such modest activity levels are not sufficient to reject subjective complaints. *See Vertigan*, 260 F.3d at 1050 ("This court has repeatedly asserted that the mere fact that a Plaintiff has carried on certain daily activities, such as grocery shopping, driving a car, or limited walking for exercise, does not in any way detract from her credibility as to her overall disability. One does not need to be 'utterly incapacitated' in order to be disabled." (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).

The Commissioner relies on *Molina* to assert that the Plaintiff's activities discredit the Plaintiff's testimony. Def.'s Br. 4; *Molina v. Astrue*, 674 F.3d 1104 (9th Cir. 2012). However, *Molina* explained that activities may be grounds for discrediting testimony only to the extent they contradict claims of a *totally* debilitating impairment. *Id.* at 1112-13. Here, while Plaintiff did testify to experiencing more issues than the medical record corroborated, Plaintiff's activities did not contradict the impairments that Plaintiff alleged, such as not being able to stand on his feet for more than two hours or experiencing dizziness. *Molina* is therefore distinguishable. There, the claimant alleged she could not tolerate even minimal human interaction and doing so would cause her panic attacks, while the evidence in the record showed that the claimant engaged in multiple activities that included human interaction, such as taking her grandchildren to school, attending church, and shopping. *Id.* at 1113. Here, Plaintiff's alleged debilitating impairments are consistent between his testimony and the medical record.

Second, the ALJ's discussion of Plaintiff's daily activities failed to explain why specific symptom testimony was not credible when compared to the Plaintiff's activities. As this Court has observed, an "ALJ's mere recitation of a claimant's activities is insufficient to support rejection of the claimant's testimony as a matter of law." *David J. v. Comm'r, Soc. Sec. Admin.*, No. 3:20-cv-00647-MK, 2021 WL 3509716, at *4 (D. Or. Aug. 10, 2021) (citation omitted).

Other than stating that Plaintiff's activities undermine the Plaintiff's subjective symptom testimony, the ALJ failed to explain how any of the listed activities undermined his subjective symptom testimony. Therefore, Plaintiff's activities of daily living were not a clear and convincing reason to reject Plaintiff's testimony. *See id.*

The Commissioner asserts that the ALJ properly discounted Plaintiff's allegations based on inconsistencies with the objective medical record. Def.'s Br. 3–4. However, a lack of objective evidence may not be the sole basis for rejecting a claimant's subjective complaints. *See Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001). Because the ALJ failed to provide a clear and convincing rationale that Plaintiff's daily activities contradict Plaintiff's subjective symptom testimony, the ALJ's analysis of the medical record cannot be a reason to reject the Plaintiff's subjective symptom testimony on its own. The ALJ erred in doing so.

B. Medical Record

As noted, the Commissioner asserts that the ALJ properly discounted Plaintiff's allegations because they were inconsistent with the objective physical and mental medical evidence. Def.'s Br. 3–4. In some circumstances, an ALJ may reject subjective complaints where the claimant's "statements at her hearing do not comport with objective medical evidence in her medical record." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). However, a lack of objective evidence may not be the sole basis for rejecting a claimant's subjective complaints. *See Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001).

An independent review of the objective medical record demonstrates that Plaintiff's subjective complaints were consistent with treatment records. Plaintiff has presented with fibromyalgia beginning in 2010. Tr. 56, 1060. A treatment record from February 2018 confirmed Plaintiff's fibromyalgia diagnosis. Tr. 519. Plaintiff also consistently presented with chronic

Applicant Details

First Name	**Bridget**
Last Name	**Kennedy**
Citizenship Status	**U. S. Citizen**
Email Address	**bridget1@stanford.edu**
Address	**Address** **Street** **114 River Oaks Drive** **City** **Grand Island** **State/Territory** **New York** **Zip** **14072** **Country** **United States**
Contact Phone Number	**7167481755**

Applicant Education

BA/BS From	**United States Naval Academy**
Date of BA/BS	**May 2017**
JD/LLB From	**Stanford University Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011**
Date of JD/LLB	**June 12, 2024**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Stanford Journal of International Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Kirkwood Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Dauber, Michelle
mldauber@law.stanford.edu
Letter, Dean's
deansletter@law.stanford.edu
650-723-4455
Weisberg, Robert
weisberg@law.stanford.edu
Grossman, Joanna
jlgrossman@mail.smu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

BRIDGET KENNEDY

555 Salvatierra Walk, Apartment 213, Stanford, CA 94305| (716)748-1755 | bridget1@stanford.edu

June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Law Clerk Application for Bridget Kennedy

Dear Judge Walker:

I am a rising third-year student at Stanford Law School and write to apply to serve as your law clerk in 2024-2025, or any future years for which you have open positions. My full-time commitment to serving others began at the age of seventeen, when I, two days after graduating high school, took my oath of office as a Plebe at the United States Naval Academy. That oath included a promise "to support and defend the Constitution of the United States against all enemies foreign and domestic." I have been upholding that promise ever since.

Upon my graduation from the USNA, I was commissioned as a Surface Warfare Officer and served as the Main Propulsion Division Officer aboard the *USS Carney*, an Arleigh-Burke class Destroyer, stationed in Rota, Spain. From piloting my ship, loaded with inter-continental ballistic missiles, at night through the Bosphorus Straits in Turkey, to engaging in a game of cat and mouse with a Russian submarine in the Black Sea, I learned how to handle pressure well and to think on my feet. Additionally, my sense of adventure has allowed me to be open to—and fearless in—tackling new challenges. Layered over those attributes is my constant commitment to excellence. I have witnessed first-hand that a rising tide raises all ships, and I have always sought to use my own life experiences to enhance the empathy, enthusiasm, and level of excellence amongst not only those I have led but those with whom I have worked and served.

My experiences and attributes have provided me with a perspective that I believe is somewhat unique compared to most judicial clerkship candidates. Retiring from the Navy, law school represented not only a new challenge but a way to continue my commitment to my oath—another way for me to serve others while supporting and defending our Constitution. I can think of no better way to deliver on that promise than to work in your chambers.

I am particularly interested in clerking for you, Judge Walker, because of my ties to Virginia, as well as your impressive career as an AUSA. I had the privilege of living under the Eastern District of Virginia's jurisdiction for about two years while I was stationed in Norfolk, Virginia. I lived in Virginia Beach and spent a significant amount of time exploring downtown

Norfolk. I really enjoyed the welcoming community of Norfolk and being so close to my fellow Navy friends. Ever since I have left Virginia, it has been my desire to return there. Additionally, as an aspiring prosecutor and AUSA myself, I would appreciate the opportunity to learn from someone who has occupied that role.

Enclosed please find my resume, references, law school transcript, and writing sample for your review. Professor Michele Landis Dauber, Professor Joanna Grossman, and Professor Robert Weisberg are providing letters of recommendation in support of my application.

I welcome the opportunity to discuss my qualifications further. Thank you for your consideration.

Very Respectfully,

Bridget Kennedy

BRIDGET BELL KENNEDY

BRIDGET KENNEDY

114 River Oaks Drive, Grand Island, NY 14072 | bridget1@stanford.edu | (716) 748-1755

EDUCATION

Stanford Law School Stanford, CA
J.D., expected 2024
Journal: *Stanford Journal of International Law* (Volume 59: Senior Editor; Volume 58: Member Editor)
Activities: Stanford Law Veterans Organization (Financial Officer), Women of Stanford Law, Kirkwood Moot Court Competition

United States Naval Academy Annapolis, MD
B.S. with Distinction, Honors Oceanography, May 2017
Honors: Captain Charles N.G. Hendrix Oceanography Award (awarded to the graduating Midshipman who is ranked first in major overall); Top 5% of class based on Overall Order of Merit
Activities: American Service Academies Program in Poland (selected to represent USNA in Poland in Service Academy program studying Holocaust and examining causes and techniques used by those engaged in genocide, as means to explore options for overcoming group-think and combating violent extremism); Platoon Sergeant (22nd Company); Squad Leader (Summer Seminar)

EXPERIENCE

Alston & Bird LLP, Washington, DC *Summer Associate*, June – August 2023

U.S. Attorney's Office for the Southern District of New York *Legal Intern*, June – August 2022
Conduct legal research, perform trial and witness preparation, and draft motions to assist two AUSAs in the General Crimes and National Security and International Narcotics Divisions.

Stanford Law School

Domestic Violence Pro Bono Project *Member*, September 2021 – Present
Support survivors of domestic violence by providing direct legal services. Seek civil remedies and relief on matters including family law and immigration issues.

Stanford Prisoner Advocacy and Resources Coalition (SPARC) *Member*, September 2021 – Present
Facilitate book club and LSAT tutoring for incarcerated women. Advocate for the women and their families.

Law Firm of William Mattar, PC, Buffalo, NY *Paralegal*, September 2020 – June 2021
Provided attorney support at high-volume personal injury law firm. Investigated claims, conducted client and witness interviews, organized and managed files, and performed legal research and writing.

United States Navy

Naval Surface Forces Atlantic, Norfolk, VA *Flag Administrative Support Officer*, April 2019 – August 2020
Led eight sailors supporting administrative preparation for the Type Commander, Chief of Staff, and Force Master Chief. Conceived and coordinated preparation of over 500 read-ahead binders and briefs. Rank: Lieutenant - Junior Grade.

USS Carney DDG-64, Rota, Spain *Main Propulsion Division Officer*, October 2017 – April 2019
Led twenty-five sailors who maintained and operated four LM2500 Gas Turbine Engines, three 501-K34 Gas Turbine Generators, and associated equipment providing power to *Arleigh-Burke-class* Destroyer. Oversaw requisition/tracking parts, inventory control, installation, and system restoration. Qualified as Surface Warfare Officer and Officer-of-the-Deck. Published "Nobody Asked Me But. . . Sexual Assault: Not in our Navy," *Proceedings Magazine,* Vol. 143/8/1,374. Aug. 2017. Rank: Ensign.

INTERESTS

Trying to travel to every country in the world, the Buffalo Bills, skydiving, bungee jumping, hang-gliding, volunteering at animal rescue shelter.

BRIDGET KENNEDY

114 River Oaks Drive, Grand Island, NY 14072 | bridget1@stanford.edu | (716) 748-1755

RECOMMENDERS

Professor Michele Landis Dauber
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650-723-2512
mldauber@stanford.edu

Professor Robert Weisberg
Stanford Law School
650-723-0612
weisberg@stanford.edu

Professor Joanna Grossman
Stanford Law School Visiting Faculty
Southern Methodist University Law School
jlgrossman@smu.edu

REFERENCES

Nicholas Bradley
Assistant U.S. Attorney for the Southern District of New York
Nicholas.Bradley2@usdoj.gov

Margaret Lynaugh
Assistant U.S. Attorney for the Southern District of New York
margaret.lynaugh@usdoj.gov

Nicole Ziolkowski
Motor Vehicle Legal Assistants Supervisor at William Mattar Law Offices
nicolez@williammattar.com

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Kennedy,Bridget Bell
Student ID : 06605675

Print Date: 06/04/2023

--------- Academic Program ---------

Program : Law JD
09/20/2021 : Law (JD)
Plan
Status Active in Program

--------- Beginning of Academic Record ---------

2021-2022 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	201	CIVIL PROCEDURE I	5.00	5.00	P	
Instructor:		Freeman Engstrom, David				
LAW	205	CONTRACTS	5.00	5.00	P	
Instructor:		Sanga, Sarath				
LAW	219	LEGAL RESEARCH AND WRITING	2.00	2.00	H	
Instructor:		Thesing, Alicia Ellen				
LAW	223	TORTS	5.00	5.00	P	
Instructor:		Mello, Michelle Marie Studdert, David M				
LAW	240K	DISCUSSION (1L): REPRESENTATIONS OF CRIMINAL LAWYERS IN POPULAR CULTURE THROUGH THE LENS OF BIAS	1.00	1.00	MP	
Instructor:		Tyler, Ronald				

LAW TERM UNTS: 18.00 LAW CUM UNTS: 18.00

2021-2022 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	203	CONSTITUTIONAL LAW	3.00	3.00	P	
Instructor:		O'Connell, Anne Margaret Joseph				
LAW	207	CRIMINAL LAW	4.00	4.00	P	
Instructor:		Fan, Mary D.				
LAW	224A	FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK	2.00	2.00	P	
Instructor:		Bakhshay, Shirin				
LAW	2402	EVIDENCE	5.00	5.00	P	
Instructor:		Fisher, George				

LAW TERM UNTS: 14.00 LAW CUM UNTS: 32.00

2021-2022 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	217	PROPERTY	4.00	4.00	P	
Instructor:		Kelman, Mark G				
LAW	224B	FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE	2.00	2.00	P	
Instructor:		Bakhshay, Shirin				
LAW	1013	CORPORATIONS	4.00	4.00	P	
Instructor:		Sanga, Sarath				
LAW	3518	LAW AND PSYCHOLOGY	3.00	3.00	P	
Instructor:		MacCoun, Robert J				

LAW TERM UNTS: 13.00 LAW CUM UNTS: 45.00

2022-2023 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	2002	CRIMINAL PROCEDURE: INVESTIGATION	4.00	4.00	H	
Instructor:		Weisberg, Robert				
LAW	5805	ANIMAL LAW	2.00	2.00	H	
Instructor:		Wagman, Bruce				
LAW	7030	FEDERAL INDIAN LAW	3.00	3.00	P	
Instructor:		Reese, Elizabeth Anne				
LAW	7820	MOOT COURT	2.00	2.00	MP	
Instructor:		Fenner, Randee J Pearson, Lisa M				

LAW TERM UNTS: 11.00 LAW CUM UNTS: 56.00

2022-2023 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	2029	LAW AND DISORDER: ADVANCED CRIMINAL LAW	2.00	2.00	H	
Instructor:		Galvin-Almanza, Emily Van Waning Mills, David W				
LAW	7013	GENDER, LAW, AND PUBLIC POLICY	3.00	3.00	P	
Instructor:		Grossman, Joanna Lynn				
LAW	7065	ONE IN FIVE: THE LAW, POLITICS, AND POLICY OF CAMPUS SEXUAL ASSAULT	3.00	3.00	H	
Instructor:		Dauber, Michele Landis				
LAW	7820	MOOT COURT	1.00	1.00	MP	
Instructor:		Fenner, Randee J Pearson, Lisa M				

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Kennedy,Bridget Bell
Student ID : 06605675

LAW TERM UNTS: 9.00 LAW CUM UNTS: 65.00

2022-2023 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	400	DIRECTED RESEARCH	1.00	0.00		
Instructor:		Weisberg, Robert				
LAW	2001	CRIMINAL PROCEDURE: ADJUDICATION	4.00	0.00		
Instructor:		Weisberg, Robert				
LAW	2009	WHITE COLLAR CRIME	3.00	0.00		
Instructor:		Mills, David W				
LAW	6003	THE AMERICAN LEGAL PROFESSION	3.00	0.00		
Instructor:		Gordon, Robert W				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 65.00

END OF TRANSCRIPT

Michele Landis Dauber
Frederick I. Richman Professor of Law
Professor, by courtesy, Sociology
559 Nathan Abbott Way
Stanford, California 94305-8610
650-723-2512
mldauber@stanford.edu

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to enthusiastically recommend Bridget Bell Kennedy for a clerkship in your chambers. I know Bridget extremely well. She was a student in my Winter 2023 class on the subject of gender-based violence. Bridget was the top student in the class and wrote an extraordinary final paper, which received an Honors grade. Bridget and I met frequently to discuss her progress on her research paper. Bridget is absolutely brilliant. As a graduate of the U.S. Naval Academy and a former military officer, Bridget brings a tremendous amount of talent, leadership, and persistence to all her endeavors. I am confident that she will be an exceptional law clerk and a formidable attorney.

Before arriving at Stanford Law School, Bridget graduated with Distinction and Honors from the U.S. Naval Academy and went on to distinguish herself as a naval officer in high-stakes, pressured environments as a chief propulsion officer on a forward-deployed destroyer. Here at Stanford Law, in a very different environment. Bridget's commitment to excellence has continued to shine through. Moving from her service as a naval officer to law school was a major transition that Bridget has navigated with determination and a stellar work ethic. She has received numerous Honors grades in addition to my course, including Legal Research and Writing, Advanced Criminal Law, and Criminal Procedure.

I would rank Bridget in the top 10% of law students I have taught in the past 20 years at Stanford, particularly given her stellar military leadership record. Bridget's final paper for my class was spectacular. In it, she conducted significant independent research, comparing and contrasting the handling of sexual assault at all three service academies as well as under the Title IX regime at non-military universities. She then recommended changes to both the military and civilian systems that relied on the best strategies from among the institutions she studied. This is an important piece of research that will help inform legislative policy efforts in this area. Moreover, in my class, I observed that Bridget works extremely well in a group setting where she listens thoughtfully to the input of others. She is always fully prepared, and her comments elevate every discussion. She is well-respected and viewed as a leader by peers and faculty.

In addition to her academic excellence, Bridget has unsurprisingly emerged as a leader among her peers. As a 2L (in 2023), she served as a senior editor of the Stanford Journal of International Law. She also participates in numerous pro-bono projects and student organizations, including the Stanford Law Veterans Organization.

After clerking, Bridget plans a career in criminal or international law. Her 1L summer was spent in the U.S. Attorney's office for the Southern District of New York. Due to her prior experience, she had the opportunity to work on National Security and International crimes, as well as general crimes. This coming summer, Bridget will work as a summer associate at a leading international firm. I have no doubt that she will quickly establish herself as a highly successful practitioner and leader in the field.

I recommend Bridget enthusiastically and without reservation. If you have any questions about this student or the foregoing, please do not hesitate to contact me via email or on my cell phone at 650-521-4046.

Sincerely,

/s/ Michele Landis Dauber

StanfordLawSchool

JENNY S. MARTINEZ
Richard E. Lang Professor of Law and Dean

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 723-4455
Fax 650 723-4669
jmartinez@law.stanford.edu

Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes "Pass" (P) as the default grade for typically strong work in which the student has mastered the subject, and "Honors" (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

H	Honors	Exceptional work, significantly superior to the average performance at the school.
P	Pass	Representing successful mastery of the course material.
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory.
F	Fail	Representing work that does not show minimally adequate mastery of the material.
L	Pass	Student has passed the class. Exact grade yet to be reported.
I	Incomplete	
N	Continuing Course	
[blank]		Grading deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading deadline has passed. Grade has yet to be reported.

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

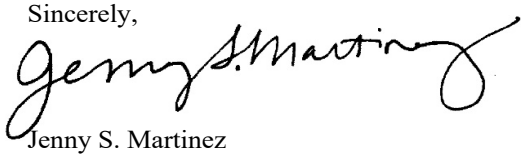
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

Robert Weisberg
Edwin E. Huddleson, Jr. Professor of Law
Faculty Co-Director, Stanford Criminal Justice Center
Associate Dean for Curriculum
559 Nathan Abbott Way
Stanford, California 94305-8610
650-723-0612
weisberg@stanford.edu

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Bridget Kennedy, Stanford, J.D. 2024, is a superb law student with all the proven analytic and writing skills you seek in your clerks. She will also come to your chambers with an absolutely amazing background as a military leader, a highly trained engineer, and a devoted civil rights lawyer-in-the-making.

I got to know Bridget quite well when she enrolled in my course in Criminal Investigation—that is the course on the Fourth and Fifth Amendments where the students must run the very difficult gauntlet of Supreme Court doctrine on searches and seizures and interrogations. She was a terrific class participant, acute and avid, and she wrote a terrific Honors level exam. My exams are notorious at the law school for being very difficult, time-pressured issues spotters. That is not necessarily a compliment to me, but it does mean that my exams really identify those with the most clerk-relevant skills. An excellent law student can have an unlucky bad day on my exam. A merely good law student cannot pull off a lucky Honors performance. And speaking of clerkship relevance, Bridget's Honors grade in our Legal Research and Writing course is further corroboration. I emphasize these courses because, in her first year, Bridget was adjusting to the discursive form of law school work after years at the Naval Academy and then in service, where detail memorization and quick analytic solutions to technical problems were the necessary modes of thinking. But again, I now have a very solid basis for inferring that she has fully cracked the code of legal doctrinal reasoning.

But let me turn to Bridget's background a bit more. Her undergraduate years were in Annapolis, at the U.S. Naval Academy, where she graduated with high honors in Oceanography while also engaged in social service programs. She then served in a number of leadership capacities as a naval officer. These are way beyond my understanding, except let me note that she was tasked to be a Chief Propulsion Officer, which means that she commanded tens of junior sailors in operating the vast and complex gas turbine technology that powered a 505-foot destroyer. So, to put it simply, this is a woman who can do anything, certainly anything, that she will encounter in her legal career. But also, while in the military, she dedicated herself to the reform of anti-sexual assault and harassment programs and ultimately was a leader in proposing and designing a reform program applied in both the service academies and actual service.

After her distinguished military career, Bridget turned to law, inspired in part by her father's past role as United States Attorney for the Western District of New York. Since coming to law school, she's thrust herself into a number of service activities, especially those dealing with prisoner advocacy and domestic violence. She's garnered internships with the U.S. Attorney for the Southern District of New York and with the famed Alston & Bird firm in Washington, D.C.

Bridget has also been drawing on her concerns about misconduct against women in the military in a very deep and broad research project. Her goal is to generate concrete reforms that can be implemented in the service academies and in active-duty service venues. This is great policy work, but it's also very hard technical legal work because it involves navigating the difficult statutory and regulatory rules of Title IX and the Clery Act. It should be a major contribution to the law on the subject.

So, Bridget will make a terrific member of your chambers team. If I can supply further information about Bridget, please let me know. Indeed, feel free to call me at your convenience via my cell phone: (650) 888-2648.

Sincerely,

/s/ Robert Weisberg

Joanna Grossman
Herman Phleger Visiting Professor of Law
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June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to recommend Bridget Kennedy, who has applied for a clerkship in your chambers. Bridget is a wonderful student who brings an unusually interesting mix of experiences and talents to the table. She is a candidate to whom you should give your most serious consideration.

I met Bridget while serving as the Herman Phleger Visiting Professor at Stanford Law School. My permanent academic home is SMU Dedman School of Law in Dallas, Texas, where I hold the Ellen K. Solender Endowed Chair in Women and Law, but I regularly teach at Stanford as a visiting professor. With twenty-five years in law teaching, including several semesters at schools such as Stanford, Vanderbilt, and UNC, I am very familiar with the range of qualities that law students might possess—and familiar with the ones that promise successful clerkship experiences. I believe Bridget has the perfect blend.

Bridget took my Gender, Law, and Public Policy class this winter. This was a small class, where I got to know each student extremely well. The quality of the classroom discussions in this class was extraordinary. I attended Stanford Law School in the early 1990s and had taken this very class. Perhaps my memory deceives me, but I don't remember my classmates having the kind of insights and experience that I discovered in this group. Bridget stood out, even among this very talented group.

Although Bridget was quiet at first, she began to participate more and more as the class progressed. And I was so glad when she did. As you can see from her resume, Bridget did not follow the typical path to law school. She attended the United States Naval Academy and then served in the Navy. I can't even begin to relate to her experiences in the military, which are so far afield from my own education and work experience. (I have certainly never piloted a ship loaded with inter-continental ballistic missiles through the Bosphorus Straights in Turkey nor played a game of cat-and-mouse with a Russian submarine in the Black Sea.) But it is obvious to me that her time in a service academy and in the U.S. military has shaped her character and her skills, as well as her passion for public service. These experiences taught her how to handle pressure, how to adapt to a rapidly changing situation, and how to think on her feet. They also exposed her to different cultures and ideas and taught her how to connect to different types of people. She is empathic and enthusiastic and expects excellence from herself and those around her.

Bridget's time in the military also provided her, perhaps unintentionally, a deep understanding of so many issues that are fundamental to gender law: gender dynamics in a traditionally male-dominated field; the impact of biological gender differences on the performance of physical tasks; the challenges of responding to problems of discrimination, harassment, and sexual assault within an institution; the tension between the needs of the individual and the goals of a cohesive group; and so on. She came from those experiences believing both that "a rising tide raises all ships" and that institutions of civil society have to be attentive to the ways in which they might systematically disadvantage marginalized groups. Bridget managed to teach the rest of us so much by bringing her own hard-won experiences into the discussion of legal and policy issues. Her contributions were not simply anecdotes, although they would have been useful ones; she made sure to think about what her education and training had taught her that might be relevant to the questions posed by her classmates or me. Her comments also provoked new questions. I can honestly say that although I have been teaching this class for 25 years, I learned things from Bridget that will change the way I think about certain issues forever.

Bridget submitted excellent papers for this class, which demonstrated that her writing style is lucid and that her analytical abilities are strong. She also showed a talent for zeroing in on important issues and highlighting persuasive facts in constructing an argument. I always looked forward to reading her papers. After the class was over, Bridget asked if I would supervise a directed research paper on sexual assault in military service academies and at American colleges and universities. This issue is deeply important and personal to Bridget, and her interest in studying it fueled her desire to attend law school in the first place. For this project, she is engaging in a comparative analysis of the sexual assault prevention and response programs employed at the military service academies and those used at traditional colleges and universities under Title IX and the Clery Act. She is exploring the advantages and disadvantages of different approaches and advocating for a new approach that combines the best features and is more effective at reducing sexual assault at post-secondary institutions in the United States. Although I am back at SMU now, I am working with her on this project. She has done excellent research for this paper and has proven capable of adhering to an ambitious schedule for completing the different stages of the project. I have enjoyed talking to her about the project, to which she brings passion and a commitment to better understanding this complex issue. Although I have not yet seen

the final draft of the paper, I am confident it will confirm my very high opinion of Bridget's academic capabilities.

Bridget will make an excellent judicial clerk. As a former clerk to the late Judge William A. Norris, United States Court of Appeals for the Ninth Circuit, I know the qualities necessary to succeed in the job. She has strong legal research and writing skills, which are obviously essential. But she also has personal qualities that will ensure her success in this position. Her contributions in my class revealed the kind of careful reading and contemplation that I expect only from the very best students, yet she displayed none of the negative qualities that top students in a competitive environment sometimes exhibit. She is strong yet humble, careful yet brave, and extremely self-aware. Through her service in the military and eventually as a lawyer, Bridget seeks to better understand the world and make it a better place.

I urge you give Bridget every consideration. Please do not hesitate to contact me if you need any additional information. I can be reached at lawjlg@stanford.edu or (516) 617-7259.

Sincerely,

/s/ Joanna Grossman

Joanna Grossman - jlgrossman@mail.smu.edu

BRIDGET KENNEDY

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WRITING SAMPLE

I drafted the attached writing sample as an assignment in the Kirkwood Moot Court Competition. The assignment required drafting a Supreme Court brief with a partner analyzing whether the use of a pole camera by law enforcement constituted a search under the Fourth Amendment. I independently conducted all of the research pertaining to my section of the brief. I have included only those sections of the brief that I drafted exclusively. This brief reflects some input from my partner in terms of what arguments we were considering making and how to best align our portions of the brief, but it is unedited by them. By the assignment's instructions, the brief my partner and I composed could not exceed 12,000 words. We each composed approximately 50% of the brief.

INTRODUCTION

Respondent Rafael "Felipe" Tafoya (hereinafter "Respondent") operated a large-scale narcotics business out of his house in Colorado Springs. Every few months, pounds of cocaine and methamphetamine were delivered to his residence, and he, in turn, trafficked those drugs into the community. Police received a tip from an informant, and after corroborating much of it, decided to install a surveillance camera on a utility pole located across the street from Respondent's property. After approximately three months of surveillance, the seizure of nearly $100,000 in cash from a vehicle which had just left Respondent's house, and their observation of various incidents consistent with drug trafficking, police sought and obtained a search warrant for Respondent's property. During the execution of that warrant, police recovered eleven kilograms of methamphetamine, half a kilogram of cocaine, and $200,000 in cash.

This Court's jurisprudence has long recognized that the Fourth Amendment does not preclude police from observing that which is plainly in public view. Because the police never physically intruded upon Respondent's property and because the pole camera the police installed only viewed those areas of his residence which were in full view of his neighbors, its use did not constitute a search.

The Colorado Supreme Court, however, would throw this settled legal framework into question and with it the ability of police to conduct routine, high-quality work. Under its rule, police would be prohibited from using investigative tools for which a warrant would otherwise not be required, if, in aggregate, such police work produced a picture of a suspect's activities that was too complete. In other words, if police are too thorough in investigating a case, then they risk, under the Colorado Supreme Court's ruling, committing a Fourth Amendment violation. According to the Colorado Supreme Court, a Fourth Amendment violation occurred in this case

despite the fact that police never observed anything that was not in public view and never physically intruded nor trespassed upon any area in which Respondent possessed a reasonable expectation of privacy. Such an expansion of the definition of what constitutes a search under the Fourth Amendment—beyond a qualitative examination of the manner in which a particular government intrusion occurred and into a *post hoc* quantitative examination of how much information an otherwise constitutional government intrusion actually produced—is unwarranted and risks confusion not only in the lower courts but also in law enforcement. Accordingly, the decision of the Colorado Supreme Court should be reversed.

STATEMENT OF THE CASE

A. Factual Background

In early 2015, police received a call from a confidential informant (CI) about a potential narcotics "stash house" and site for narcotics transactions. App. 21. Although the CI did not provide the specific address, the CI did provide a description of the alleged stash house and of some of the vehicles known to be associated with the residence. App. 21-23. The CI identified "Felipe" as the owner of the house. App. 22. Following the call, police substantially verified the CI's information using publicly available property, utility, and vehicle records and by physically driving by the house. App. 88. To further corroborate the alleged narcotics trafficking occurring at Respondent's property, police installed a camera on a utility pole located across the street from the house on April 15, 2015. App. 24. The camera began recording on May 16, 2015. App. 11.

The pole camera police installed was stationary, although it had zoom, pan, and tilt features. App. 14. Even though the camera recorded 24 hours-a-day, 7 days-a-week, it did not have infrared or night vision features. App. 88-89. The camera did not have audio capabilities. App. 14. While police had the ability to go back and look at the recordings at any time, at most

times, the camera was not actively monitored. App. 24. Instead, the police would typically examine the footage closely only when they received tips that there was a drug transaction that was likely to transpire—as they did on June 25 and August 23. App. 12, 24-25. Footage that was not viewed live was more pixelated and less clear than live footage. App. 14. Police ended their surveillance of the property on August 24, 2015. App. 135.

The view from the pole camera was primarily of the front yard of Respondent's property. App. 25. The property had a chain link fence around the front yard. App. 65. The pole camera's view of the front yard was the same as that which one would have while walking on the sidewalk in front of the house. App. 65-66. The property also had a six-foot-high wooden fence which enclosed the backyard. App. 29. Such fence had spaces between its wooden slats, *id.*, and a portion of it was shared with Respondent's next-door neighbor, App. 41-42. Law enforcement confirmed that looking between the slats in the fence would allow an observer to see the same activity in Respondent's backyard that the pole camera could see. App. 29.

The wooden fence had a gate that allowed vehicles to enter the backyard, where the driveway continued into a garage. App. 17. There was also a "Beware of Dog" and "No Trespassing" sign affixed to the fence. App. 79. The backyard contained a garage as well as a small shed. App. 26. The garage had a moving overhead door. App. 66. When the garage door was open, the pole camera, if actively monitored with the use of the zoom function, provided a view of only the very upper portions of the garage but did not allow police to see what was occurring inside the garage. App. 67. The pole camera's view of the backyard was the same view that a utility worker would have if they were doing work on top of the pole. App. 34.

Although a different vantage point, the pole camera's view of the backyard was also similar to the view from a two-story apartment building that was located adjacent to

Respondent's property. App. 34, 61. The apartment building rises well above the six-foot wooden-slat fence that surrounds the rear of Respondent's property. The stairs up to and landings at the second-story apartments provided a particularly clear view into Respondent's backyard. App. 61. Notably, any person located in those areas—neighbors, guests, delivery persons, or others—could view the same activities captured by the pole camera. App. 46, 51, 54, 61.

On June 25, 2015, police received a second tip from a CI about drug trafficking at the residence. App. 73. The CI alleged that a narcotics transaction would occur at Respondent's property that day. *Id.* In response to the tip, a police detective actively monitored the pole camera and observed what he believed to be a narcotics transaction. *Id.* Specifically, the detective observed two males arrive in a car at Respondent's property. App. 17. Respondent opened the fence to let the vehicle into the backyard area of his property. *Id.* Once the vehicle was behind the fence that surrounded Respondent's backyard, several individuals, together with Respondent, began to perform some work underneath the same car in which the two men had arrived. *Id.* The detective observed the men carry empty white garbage bags to the car, work on the car for a bit, then carry the same, now-full bags back to Respondent's garage. App. 19. The police were unable to see what was in the bags or what was done with the bags after they were carried into the garage. *Id.*; App. 35.

The detective then noticed a pick-up truck arrive at Respondent's property. App. 19. Upon the truck's arrival, the men appeared to change one of the truck's spare tires. *Id.* The pick-up truck then left the property. App. 20. After the truck had left Respondent's property, police pulled the truck over for a traffic violation and searched the vehicle whereupon they found $98,000 in currency in the truck's spare tire. App. 38-39. The currency contained traces of narcotics. App. 39.

On August 23, 2015, the police received a third tip about possible drug trafficking at the residence. App. 74. Specifically, the police were told that a narcotics transaction was going to take place at the residence the next day, August 24. *Id.* As a result, detectives actively monitored the pole camera feed on the 24th. *Id.* Police saw the same car that they had previously observed arrive at the premises on June 25 pass through the gate and into the backyard. App. 41-44. The police then saw Respondent access the driver's side area of the car and follow the same pattern as had been observed on June 25: men walked to the car with empty white trash bags and then walked away from the car and into the garage with full bags. App. 42. As during the June transaction, police could not see what was happening inside the garage nor what was inside the bags. *Id.*; App. 43.

Based on their observations of pole camera footage, police sought and obtained a warrant for Respondent's property. App. 44. Respondent's property was secured in anticipation of obtaining the warrant. *Id.* During the warrant's execution, police discovered two of the aforementioned white garbage bags in the garage. *Id.* One bag contained five pounds of methamphetamine and a half-kilogram of cocaine; the other bag contained fifteen pounds of methamphetamine. *Id.* Inside the car, police discovered $172,000 in cash. *Id.* A codefendant at the residence had $7,200 in cash on his person, and police found $28,000 in cash in the bedroom of Respondent's house. App. 45. The police later found two plastic bags containing two pounds of methamphetamine and a half-kilogram of cocaine located in the bed of a pickup truck that had again recently left Respondent's property. *Id.*

B. Procedural History

Respondent was charged with two counts of possession with intent to distribute controlled substances (methamphetamine and cocaine) and two counts of conspiracy to commit

such crimes. App. 88. He moved to suppress all evidence obtained as a result of the pole camera surveillance, including the evidence seized pursuant to the search warrant, arguing that police use of the camera violated the Fourth Amendment. *Id.* The trial court denied the motion, finding that Respondent did not have a reasonable expectation of privacy in what was occurring behind his wooden fence because that area was exposed to the public, and therefore the use of the pole camera did not constitute a search. App. 95.

Subsequently, Respondent was found guilty on all counts and was sentenced to fifteen years' imprisonment. App. 105. Respondent appealed, and the Colorado Court of Appeals reversed his conviction and remanded the case for a new trial, after concluding that the three-month-long use of the pole camera constituted a search under the Fourth Amendment. *People v. Tafoya*, 490 P.3d 532, 534 (Colo. App. 2019); App. 98. The State, in turn, appealed that decision, and the Supreme Court of Colorado determined, as the Court of Appeals did, that the continuous use of the pole camera by the police to conduct video surveillance of Respondent's fenced-in property for three months constituted a warrantless search in violation of the Fourth Amendment. *People v. Tafoya*, 494 P.3d 613, 615 (Colo. 2021); App. 32. This Court granted certiorari. App. 158.

SUMMARY OF THE ARGUMENT

[Section omitted as it was mutually composed together with my moot court partner]

ARGUMENT

I. The Use of a Utility Pole Camera to Monitor Activities Visible to the Public Was Not a Search Under the Fourth Amendment.

A. This Court Has Long Recognized That There Is No Reasonable Expectation of Privacy in Information That Is Exposed to the Public View.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This Court has employed two separate tests to determine whether government conduct is a search within the meaning of the Fourth Amendment. Specifically, this Court has recognized that a Fourth Amendment search occurs when the government either physically intrudes, without consent, upon "a constitutionally protected area in order to obtain information," *United States v. Jones*, 565 U.S. 400, 407 (2012), or otherwise infringes on an "expectation of privacy that society is prepared to consider reasonable," *United States v. Karo*, 468 U.S. 705, 712 (1984). To establish a reasonable expectation of privacy, Respondent must show "first that [he] . . . exhibited an actual (subjective) expectation of privacy and, second, that [his] expectation [is] one that society is prepared to recognize as [objectively] 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see also California v. Ciraolo*, 476 U.S. 207, 211 (1986).

The Fourth Amendment does not, however, protect what "a person knowingly exposes to the public, even in his own home or office," *Katz*, 389 U.S. at 351, or curtilage, *see Ciraolo*, 476 U.S. at 213. Moreover, police are not required "to avert their eyes from evidence of criminal activity that could have been observed by any member of the public." *California v. Greenwood*, 486 U.S. 35, 41 (1988). As a result, even in situations in which it might be unlikely or impracticable that a member of the public would observe an individual's activities, so long as such activities are observable by the public, this Court has refused to recognize a reasonable expectation of privacy simply because it was the police rather than the public that made such observations. *See, e.g.*, *Florida v. Riley*, 488 U.S. 445, 450-51 (1989) (finding that a homeowner had no objectively reasonable expectation of privacy that his greenhouse was protected from

public or official observation from a helicopter lawfully flying 400 feet over property); *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986) ("[N]othing in [aerial] photographs [of an industrial plant complex from navigable airspace] suggests that any reasonable expectations of privacy have been infringed."); *Greenwood*, 486 U.S. at 41 ("[S]ociety would not accept as reasonable respondents' claim to an expectation of privacy in trash left for collection in an area accessible to the public."); *United States v. Knotts*, 460 U.S. 276, 281 (1983) (upholding use of radio transponder to track vehicle because a person generally "has no reasonable expectation of privacy in his movements from one place to another" because such movements are "voluntarily conveyed to anyone who want[s] to look").

Even in situations in which an individual establishes a subjective expectation of privacy by, for example, taking some precautions to shield his activities from public observation, the test for the legitimacy of that expectation "is not whether the individual chooses to conceal assertedly 'private' activity," but instead "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Ciraolo*, 476 U.S. at 212, 213-14 (recognizing that a "10-foot fence might not shield [illicit] plants [being grown behind such fence] from the eyes of a citizen or a policeman perched on the top of a truck or a two-level bus" and upholding legitimacy of aerial surveillance of such plants on the grounds that "respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor")

That which this Court considers "observable to the public" is not limited to unenhanced visual observation alone. This Court permits law enforcement to use technology to "augment the sensory faculties bestowed upon them at birth" without violating the Fourth Amendment. *Knotts*, 460 U.S. at 282. Notably, the video camera at issue in this case was not a form of technology that

provided law enforcement with information that was "otherwise unknowable." *See Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018). Nor did it provide information which could not have been otherwise obtained without using advanced technology to effectively enter the home. *See, e.g.*, *Florida v. Jardines*, 569 U.S. 1, 12-14 (2013) (Kagan, J., concurring) (using a drug-sniffing dog to investigate the contents of the home is a search), *with Kyllo v. United States*, 533 U.S. 27, 40 (2001) (using a thermal-imaging device to see the "intimate details" within a home constitutes a search).

In this case, the police used a pole camera located in public space—and not on Respondent's property—to observe portions of Respondent's property that were otherwise lawfully visible to his neighbors. There was no trespass or physical intrusion on Respondent's property, and consequently, whether the installation and use of the pole camera constituted a search in this case is entirely dependent upon whether Respondent is able to demonstrate, in accordance with *Katz*, that he had a reasonable expectation of privacy in the areas captured by the pole camera.

That Respondent's property, including most crucially his backyard, was visible to the public is plain. Any utility technician conducting routine maintenance work on the utility pole to which the camera was attached could have seen into his backyard. App. 34. In addition, the fence surrounding Respondent's property had spaces between the slats that his neighbors could have easily looked through over extended periods of time. App. 29. Most importantly, the adjacent multi-story apartment complex, rising high above Respondent's fence, offered a nearly unimpeded view of Respondent's backyard, including those areas captured by the pole camera. App. 34, 61. Together, these facts militate strongly against the notion that Respondent had a subjective expectation of privacy in the area captured by the pole camera; his neighbors could

see all that was happening. Yet, even if Respondent was able to establish such a subjective expectation of privacy, it was not objectively reasonable. Whatever was captured by the pole camera could have also been captured by the eye (or cell phone or video camera) of any member of the public or law enforcement living or positioned on the upper floors of the adjacent apartment building. The probability that a neighbor would look into Respondent's backyard in the intermittent way in which police actually watched the pole camera footage was likely not meaningfully less than the probability that, for example, someone in a passing aircraft would look into the property. *Riley*, 488 U.S. at 450-51; *Dow Chem. Co.*, 476 U.S. at 239. Thus, as in *Riley* and *Dow Chemical,* there can be no reasonable expectation of privacy. Moreover, that police chose instead to use a more efficient technology to carry out this equivalent, constitutional observation of public activities does not offend the Fourth Amendment. They were, in this Court's parlance, merely "augment[ing]" their natural abilities. *See Knotts*, 460 U.S. at 282.

Nor does the presence of Respondent's fence and "No Trespassing" sign put the area off limits to police observation. Even if the fence and signs suggest Respondent's "subjective expectation of privacy" in the area it surrounded, to be valid, it must also be an "expectation that society is prepared to recognize as reasonable." *Katz*, 389 U.S. at 361. Given that the backyard was plainly visible to the public surrounding Respondent's property, this expectation should not be considered "objectively reasonable." *Katz*, 389 U.S. at 361. The "mere fact that an individual has taken measures to restrict some views of his activities" does not preclude a police officer from nonetheless observing them provided she does so from where she has a right to be and from which she can clearly see the activities in question. *Ciraolo*, 476 U.S. at 213. *Ciraolo* involved a defendant who had erected a ten-foot-high fence—more than one and one-half times as tall as the fence in this case—in a similarly suburban area. *Id.* at 209. Yet this Court held that the existence

of the fence did not render the homeowner's asserted expectation of privacy to be objectively reasonable. *Id.* at 213. By extension, the same minimal weight must be given to the privacy fence here. To hold otherwise would risk predicating an individual's Fourth Amendment protections exclusively on their own subjective beliefs. To grant individuals the opportunity to immunize their illicit activities exclusively by taking ineffective precautions to shield their criminality from the observations of others is objectively unreasonable and something which neither our society nor this Court should sanction. As the Second Circuit has aptly noted, if an individual were to run around their backyard naked, it would be unreasonable for them to expect this act to be private, and "there is no reason why the judiciary should clothe similarly located drug traffickers in cloaks of invisibility." *United States v. Lace*, 669 F.2d 46, 51 (2d Cir. 1982).

B. The Fourth Amendment Does Not Prohibit Police from Using Widely Available Technology To Conduct Visual Surveillance Of Publicly Exposed Information.

Advancing technology has drastically changed society's reasonable expectations of privacy and further militates against finding a reasonable expectation of privacy against video camera surveillance from stationary pole cameras. While this Court in *Jones* suggested that there may be situations in which the use of electronic technology to collect evidence which might have otherwise been obtained through traditional visual or physical surveillance might amount to an "unconstitutional invasion of privacy," it also went on to note that, "[t]his Court has to date not deviated from the understanding that mere visual observation does not constitute a search." *Jones*, 565 U.S. at 412 (citing *Kyllo*, 533 U.S. at 31-32).

Additionally, although this Court has cautioned that the government's use of some technologies falls within the ambit of the Fourth Amendment, it has also reaffirmed the principle that "[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory

faculties bestowed upon them at birth with such enhancement as science and technology afforded them in certain instances." *Knotts*, 460 U.S. at 282.

Where the Court has recognized that law enforcement's use of technology constituted a Fourth Amendment search are in those instances in which the police use "a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion." *Kyllo*, 533 U.S. at 40. In such situations, this Court has concluded that the use of such technology constitutes a Fourth Amendment search "and is presumptively unreasonable without a warrant." *Id.* In *Kyllo*, the Court held that the government's use of a thermal imaging device that detects relative heat levels within a residence amounted to an unlawful search in violation of the Fourth Amendment. While the thermal imaging device did not physically intrude on the defendant's property, the Court expressed concern about "leav[ing] the homeowner at the mercy of advancing technology." *Id.* at 35.

Unlike the "advanc[ed]" technology at issue in *Kyllo*, however, cameras are commonplace in society, and this Court has therefore unsurprisingly routinely approved their use by law enforcement to aid investigations. In *Dow Chemical*, the Court held "that the taking of aerial photographs of [a 2,000-acre] industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment." 476 U.S. at 239. The Court acknowledged that "the technology of photography has changed in this century," *Id.* at 231. It went on to say:

> It may well be . . . that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give [the government] more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment.

Id. at 238. "The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems" because the aerial photography cameras—like the pole camera—did not raise the "far more serious questions" presented by a device that could "penetrate walls or windows so as to hear and record confidential discussions." *Id.* at 238-39.

Similarly, in *Ciraolo*, decided the same day as *Dow Chemical*, the Court concluded that the police did not violate the Fourth Amendment when they observed and photographed the defendant's marijuana plants while flying 1,000 feet overhead in a private plane. *Ciraolo*, 476 U.S. at 209-10. The Court explained that although the defendant may have demonstrated a subjective expectation of privacy by erecting fences, society was not prepared to accept that expectation as reasonable because the government surveilled "within public navigable airspace . . . in a physically nonintrusive manner." *Id.* at 213. In other words, "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." *Id.* at 213-14. Most recently, this Court has expressly declined to "call into question conventional surveillance techniques and tools, such as security cameras." *Carpenter*, 138 S. Ct. at 2220.

Recently, the Seventh Circuit decided a case which is factually similar to this one and involved the use of three pole cameras in furtherance of a narcotics trafficking investigation, which captured nearly eighteen months of footage of the defendant's property. *United States v. Tuggle*, 4 F.4th 505, 511 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1107 (2022). Along the way to its ultimate conclusion that the prolonged use of the pole cameras did not constitute a Fourth Amendment search, the court recognized that in the interconnected, globalized, and digital world we live in today, Americans have "largely accept[ed] that cell phones will track their locations, their Internet usage will leave digital footprints, and ever-watching fixed cameras will monitor

their movements." *Id.* at 510, 529. The court further recognized that so long as the "government moves discreetly with the times, its use of advanced technologies will likely not breach society's reconstituted (non)expectations of privacy." *Id.* at 510. In other words, when police employ a technology that is in general public use, or put differently, is not ahead of the times of the public, then its use need not be considered a search.

Here, the type of surveillance camera at issue is most certainly readily available to the public and readily used by them as well. As the *Tuggle* court observed, "cameras are ubiquitous, found in the hands and pockets of virtually all Americans, on the doorbells and entrances of homes, and on the walls and ceilings of businesses." *Id.* at 516. In addition, Ring doorbells, Simplisafe, ADT security, and a host of other home security systems marketed to ordinary consumers typically have cameras that function similarly to—if not with more advanced technology than—the pole camera here. These cameras can generally zoom and pan, and can be placed anywhere on someone's property, and thus the fact that the pole camera employed here had the ability to pan, tilt, and zoom features assuredly does *not* make it a "far cry" from the extremely sophisticated technology that is readily available to the public. *Id.* This camera could not see or hear through walls, nor did it afford the police the capacity to "explore details of the home that would previously have been unknowable without physical intrusion." *Id.* (*quoting Kyllo*, 533 U.S. at 40) In fact, it did not go beyond the run-of-the-mill video or surveillance camera that has been widely used for decades and can be purchased at virtually any electronics retailer.

C. Pole Camera Observation Does Not Raise the Same Privacy Concerns That Motivated the GPS Tracking and CSLI Exceptions to This Long-Established Legal Framework.

[Omitted as it was mutually composed together with my moot court partner]

1. Pole Cameras Cannot Collect Sufficient Sensitive Information to Invade the Privacies of Life.

[Omitted as it was mutually composed together with my moot court partner]

2. Pole Cameras Remain Too Labor-Intensive for Law Enforcement to Problematically Scale Up Their Use.

[Omitted as it was mutually composed together with my moot court partner]

3. Unlike CSLI, Pole Cameras Cannot Recreate Retrospective Data from Before the Suspect Was Under Investigation.

[Omitted as it was mutually composed together with my moot court partner]

II. Extending Jones and Carpenter Would Introduce Considerable Confusion for Lower Courts and Law Enforcement.

[Omitted as it was mutually composed together with my moot court partner]

III. Legislatures Can Regulate Pole Cameras More Effectively Than the Fourth Amendment Can.

[Omitted solely for length purposes. Can provide upon request]

IV. Even if the Pole Camera Was a Search, It Was Reasonable Under the Fourth Amendment.

[Omitted as it was mutually composed together with my moot court partner]

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Supreme Court of Colorado suppressing the evidence in this case.

Applicant Details

First Name	**Adrian**
Middle Initial	**K**
Last Name	**Kibuuka**
Citizenship Status	**U. S. Citizen**
Email Address	**akkibuuka@umaryland.edu**
Address	**Address** Street **4 Heritage Farm Court** City **Montgomery Village** State/Territory **Maryland** Zip **20886** Country **United States**
Contact Phone Number	**2405352342**

Applicant Education

BA/BS From	**Towson University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Maryland Francis King Carey School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=52102&yr=2011**
Date of JD/LLB	**May 15, 2024**
Class Rank	**Not yet ranked**
Law Review/ Journal	**Yes**
Journal(s)	**Maryland Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Maryland Carey Law Moot Court Board**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

May, Anthony
amay@browngold.com
4109621030

Gordon, Robert
r.gordon@law.umaryland.edu

Graber, Mark
mgraber@law.umaryland.edu
(410) 706-2767

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Adrian Kibuuka
4 Heritage Farm Court ● Montgomery Village, MD 20886

June 12, 2023

The Honorable Jamar Walker
United States District Judge
U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
401 Courthouse Square
Alexandria, VA 22314

Dear Judge Walker:

I am a third-year student at the University of Maryland Francis King Carey School of Law who wishes to become your judicial law clerk for the 2024–2025 term. I have a passion for litigation and writing and desire the opportunity to explore and develop in this position.

Throughout my legal career, attorneys and mentors have advised me to find work settings where I bring value and settings that align with my goals. For those reasons, I chose your chambers. Your criminal law experience intrigues me due to my own interest in criminal law. During my 2L fall semester, my Criminal Procedure Professor constantly hosted federal public defenders along with Assistant United States Attorneys ("AUSA"). These attorneys regaled us with various cases as they applied to the material we were learning at the time. It was a worthwhile experience as it breached the gap between theory and practice. Seeing your extensive criminal law experience as an AUSA, I knew I had to apply to your chambers. In hopes to continue learning from experienced veterans in the criminal law arena, your tutelage, and insight would be priceless and highly beneficial for my future.

As for my career as a law student, I started my journey at Widener in Delaware, where I finished my first year in the top 20% of my class. Additionally, I was elected to the Black Law Students Association executive board. I subsequently transferred to Maryland Carey Law. At my new school, I successfully petitioned Maryland Law Review. I also competed in the school's annual Moot Court Competition, which earned me a seat on the school's Moot Court Board. Additionally, I built a great rapport with classmates, professors, and Maryland alums. This summer at Bekman, Marder, Hopper, Malarkey & Perlin, LLC, I worked with attorneys on various assignments. These included topics such as products liability and other work, including drafting legal memoranda and motions, along with attending meetings and mediations.

As your law clerk, I plan to bring the same vigor and commitment to success displayed in the past. My strengths include adaptability and multitasking. Both were shown when I transferred law schools and successfully petitioned Maryland Law Review and the Moot Court Board. Even more, I worked for the Honorable Matthew J. Maddox as a judicial intern, which provided insight into working in the intimate setting of a judge's chambers. These experiences strengthened my skills, and I plan to continue in the same vein.

Thank you for taking the time to read this cover letter, and I hope I am granted an interview with you. You can contact me by phone at (240) 535-2342 or via email at akkibuuka@umaryland.edu. I look forward to hearing from you.

Sincerely,

Adrian Kibuuka

Adrian K. Kibuuka

4 Heritage Farm Court • Montgomery Village, MD 20886 • 240-535-2342
akkibuuka@umaryland.edu

Education

University of Maryland Francis King Carey School of Law, Baltimore, MD
Juris Doctor Candidate, May 2024

- GPA: 3.17/4.0
- *Maryland Law Review*, Notes and Comments Editor
- *Moot Court Board*, Treasurer
- Black Law Students Association

Towson University, Towson, MD
Bachelor of Science, May 2021

- GPA: 3.2/4.0

Legal Experience

Bekman, Marder, Hopper, Malarkey and Perlin, LLC, Baltimore MD
Summer Associate, May 2023 – August 2023

- Conduct research and write legal memorandums for attorneys
- Attend mediations and depositions
- Proofread motions for attorneys

U.S. District Court for the District of Maryland, Baltimore, MD
Judicial Extern to The Honorable Matthew J. Maddox, January 2023 – April 2023

- Conducted legal research
- Worked alongside the clerk to draft opinion recommendations for Judge Maddox
- Drafted a bench memorandum for Judge Maddox

Advancing Real Change (ARC Life), Baltimore, MD
Summer Intern, Summer 2022

- Assisted mitigation specialists on defense teams for indigent clients, with the goal of developing an accurate, multi-dimensional account of the client's life.
- Assisted with investigating circumstances of the offense.
- Conducted case research, and exhaustive records searches.

Law Office of Frank J. Coviello, Gaithersburg, MD
Law Intern, September 2016 – May 2017

- Gained valuable insight and experience as to all facets of administration and operations of a small law office; gathered required documentation to set up new client files.
- Communicated effectively with clients to enhance current and prospective relationships.

Other Experience

Costco's Depot, Monrovia, MD
Depot Clerk, July 2019 – August 2021

- Lead Associate in the Receiving Department. Received and delivered new merchandise; interacted with vendors and handled returns.

Catholic Campus Ministries, Newman Center, Towson University, Towson, MD
Towson Chapter Treasurer, August 2019 – May 2020

- Led the Newman community as an Executive Board Member.
- Partnered with Chaplain and President to organize club events and managed budget for the club to the University Student Government Association.
- Spearheaded program that reduced Archdiocese costs by securing larger budget from the University.

Skills/Languages

Lexis+, WestLaw Edge, Budget Analysis;
Proficient in Luganda.

OFFICIAL TRANSCRIPT

Patricia A. Scott
University Registrar
University of Maryland, Baltimore

Student No: @00323087 Date Issued: 05-JUN-2023

Record of: Adrian K Kibuuka Page: 1
Current Name: Adrian K. Kibuuka

Issued To: ADRIAN KIBUUKA
AKKIBUUKA@UMARYLAND.EDU
Parchment DocumentID: TWBL5GNK

Course Level: School of Law

Current Program
Major : Law

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:						
2021-2022		WIDENER UNIV SCHOOL OF LAW				
LAW	065Y	TRANSFER COURSE	1.00	TR		
LAW	506A	CRIMINAL LAW	3.00	TR		
LAW	527A	CIVIL PROCEDURE	4.00	TR		
LAW	528A	CON LAW I: GOVERNANCE	2.00	TR		
LAW	530A	CONTRACTS	4.00	TR		
LAW	534A	PROPERTY	6.00	TR		
LAW	535A	TORTS	6.00	TR		
LAW	550A	INTRODUCTION TO LEGAL RESEARCH	1.00	TR		
LAW	564A	LAWYERING I	3.00	TR		
LAW	565A	LAWYERING II	2.00	TR		
Ehrs: 32.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
INSTITUTION CREDIT:						
Fall 2022						
LAW	515H	CRIMINAL PROCEDURE	3.00	B+	9.99	
LAW	521T	WILP: ADV APPELLATE ADVOCACY	3.00	B+	9.99	
LAW	523S	THURGOOD MARSHALL SEMINAR	3.00	B+	9.99	
LAW	529A	CON LAW II: INDIVIDUAL RIGHTS	3.00	B-	8.01	
LAW	578F	EVIDENCE	3.00	B+	9.99	
Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 47.97 GPA: 3.20						
Spring 2023						
LAW	514A	LEGAL PROFESSION	2.00	B	6.00	
LAW	530D	MOOT COURT: MYEROWITZ COMP	1.00	CR	0.00	
LAW	531C	MARYLAND LAW REVIEW	1.00	CR	0.00	
LAW	544S	ASPER JUDICIAL EXT WORKSHOP	1.00	CR	0.00	
LAW	576F	ESTATES AND TRUSTS	3.00	B+	9.99	
LAW	580B	FAMILY LAW	3.00	B	9.00	

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Ehrs: 11.00 GPA-Hrs: 8.00 QPts: 24.99 GPA: 3.12						
IN PROGRESS WORK						
LAW	516B	ASPER JUDICIAL EXTERNSHIP	4.00	IN PROGRESS		
In Progress Credits 4.00						
Fall 2023						
IN PROGRESS WORK						
LAW	531D	MOOT COURT BOARD	2.00	IN PROGRESS		
LAW	537U	CRIMINAL APPELLATE CLINIC	4.00	IN PROGRESS		
LAW	563S	WRIT LW PRAC:AD WR FED CIV LIT	3.00	IN PROGRESS		
LAW	568G	TRIAL PRACTICE	3.00	IN PROGRESS		
LAW	572C	BUSINESS ASSOCIATIONS	3.00	IN PROGRESS		
LAW	576G	ADV LEG RESEARCH(DISTANCE EDU)	1.00	IN PROGRESS		
In Progress Credits 16.00						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	26.00	23.00	72.96	3.17
TOTAL TRANSFER	32.00	0.00	0.00	0.00
OVERALL	58.00	23.00	72.96	3.17

********** END OF TRANSCRIPT **********

June 19, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is with great pleasure that I write to recommend Adrian Kibuuka for a judicial clerkship. Mr. Kibuuka is a skilled writer, exceptional researcher, and a well-rounded orator. He would be an asset to any chambers, and I recommend him without hesitation.

I met Mr. Kibuuka when he was a student in my Advanced Appellate Advocacy course at the University of Maryland Carey School of Law. Early in the semester, he stood out among his colleagues. He participated in class by asking insightful questions and fostered a productive dialogue about the issues. He quickly grasped fundamental legal principles while diving further into the nuances of the cases. He came to me often to discuss various matters so that he could better grasp the concepts and did not hesitate to reach out for guidance when he needed it. Throughout the semester, it was very clear to me that he genuinely cared about learning the materials and mastering writing, not just getting a high grade.

Mr. Kibuuka's written product demonstrated exceptional growth throughout the semester. In each and every draft, his writing grew more concise, pointed, and persuasive. By the end of the term, he learned to skillfully weave the facts into the law and logically present his positions while imparting a theme for the reader and addressing critical public policy concerns.

At oral argument, Mr. Kibuuka was poised, prepared, and passionate, arguing as if he had been an appellate advocate for years. He addressed questions directly while effortlessly transitioning back to his prepared statements. He responded to myriad issues succinctly while remaining composed and professional. All three judges on the panel commended him for his calm, even keeled demeanor and his command of the facts and case law.

Having known and worked with Mr. Kibuuka, I can say that he has a personality that one desires in a coworker. He is kind, thoughtful, humble, and open-minded. His ability to soak up information like a sponge, learn from his mistakes, and constantly improve is a quality that I truly admire about him. In my opinion, those attributes are the most coveted and scarce among applicants.

Mr. Kibuuka has the skill and acumen to succeed well above expectations in a judicial clerkship. If I can be of any further assistance, please do not hesitate to contact me.

Very truly yours,

Anthony J. May

Anthony May - amay@browngold.com - 4109621030

June 14, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to offer enthusiastic support for Adrian Kibuuka's application to serve as your law clerk. After a full career in practice, and then serving 14 years on the U.S. Bankruptcy Court for the District of Maryland, I have been teaching at University of Maryland Carey Law since 2021. Last semester, I taught evidence and that is how Adrian and I met. I have been impressed with his tenacity, drive and intellect since the very first day of class. He is a very smart young man and a very hard worker.

He approached me as soon as that first class ended, told me he was interested in becoming a federal law clerk and asked me how to reach that goal. Following up on my suggestions, Adrian contacted the Honorable (Ret.) Gerald Bruce Lee of the Eastern District of Virginia and became involved in Just The Beginning – a Pipeline Organization's program geared towards nurturing a meritorious and diverse judicial workforce through, in part, sharing the wealth of law clerk positions and internships. Adrian is dedicated to serving the judiciary – and the community it serves – and has a well-developed sense of the enormous benefits to be gained by a young lawyer because of that experience.

I require my students to earn twenty percent of their evidence grade through oral participation in class. That participation usually consists of reviewing a case or two assigned for that evening's class and addressing one or more of the hypothetical problems included in the casebook. Adrian was one of the first to volunteer and he did a splendid job explaining, Tuer v McDonald, 347 Md. 507 (1997). Tuer analyzed Maryland's equivalent of Federal Rule of Evidence 407 and its application in a medical malpractice case where the hospital's standard course of treatment was changed following the death of the plaintiff's husband. Suffice to say that the reasoning is not easy to grasp even for practicing lawyers, yet Adrian captured all the important nuance and excelled in his presentation.

I make my final exam tough because I want my students to be challenged and I believe the public interest demands that only qualified attorneys practice law, especially in the courtroom. Adrian received a B+, and I consider that to be an excellent grade. Nevertheless, he still asked me to review his responses to pinpoint how he could have done better. He accepted my critique with humility and thoughtfulness. Since then, we have stayed in contact and have continued to maintain a strong, mentoring relationship. I am pleased to acknowledge his fine attributes and would support his effort for any high quality legal position.

All of this adds up to an excellent lawyer in the making and I strongly recommend Adrian for a position as your law clerk. I would be happy to answer any questions you may have. I am,

Very truly yours,

_____ /s/ _____
Robert A. Gordon

June 20, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am honored to recommend Mr. Adrian Kibuuka for a state or federal judicial clerkship. Mr. Kibuuka was a student in Constitutional Law I: Governance, which I taught at the University of Maryland Carey School of Law during the fall 2022 semester and he is presently doing an independent written work project with me on regulation of the internet for the spring 2023 semester. Mr. Kibuuka had a fine performance in Constitutional Law I, marred only by some time problems on the examination, to be considered.below. He is writing an excellent paper on the responsibility of internet carriers for hate speech that appears on their platforms. On the basis of this experience and approximately twenty years of law school teaching, I am confident that Mr. Kibuuka is destined to be a fine member of the bar and an excellent judicial clerk. He merits serious consideration for any chamber in Maryland.

Mr. Kibuuka performed well in Constitutional Law I. His class attendance was perfect in mind and body. He regularly sat in the fourth row on the left and, if memory serves me correctly, was present for every class. He was not on the original roster and therefore was not on my original call list. He noticed this (not me) and on his initiative (I would have never noticed) got back on the list and served as an expert in several cases. Experts are grilled for at least fifteen minutes on the facts, legal reasoning and consequences of the assigned case. Mr. Kibuuka was excellent in all areas. He would recite the facts of the cases as diverse as Blaisdell v. Home Mortgage and Loan (contracts clause) and Kennedy v. Bremerton School District (religious freedom). He had masted the doctrinal elements of each case and could apply that doctrine to new fact patterns. His responses moved the class forward. Mr. Kibuuaka was as articulate and professional when he volunteered responses to questions in class. He has strong opinions, particularly on the capacity of an eighteenth-century constitution to govern a twenty-first century regime. When discussing free speech law made by people who could not imagine a telegraph, much less the internet, he was able to demonstrate a mastery of past doctrine and the problems applying past doctrine to present cases. The result was he was one of the more respected voices in the class.

The first three-quarters of Mr. Kibuuaka's final examination were consistent with his performance in the class. He did A/A- work on the issue spot. Almost without fail, Mr. Kibuuaka was able to identify constitutional issues, identify the relevant constitutional provision and precedent, and apply the law to the hypothetical facts. His take-home essay was solid, if a little conventional. Mr. Kibuuka defended the doctrines associated with living constitutionalism and explained why consistent with those doctrines some past decisions he thought mistaken were ripe for overruling, while others were not. He wrote clearly and persuasively If the exam had included only 10 multiple choice questions, his grade would have been between a B+ and an A-. Alas, the examination included 30 multiple choice questions. Mr. Kibuuka ran out of time, missed a bunch of questions and failed to put down any answer for the last 10. The result was a B- (had he merely put 10 A's in a row for the last ten questions (or otherwise given random answers), the probably of getting 2-3 right would have bumped his grade to a B.

The good news from your perspective is that my experience with Mr. Kibuuka indicates that this was a test problem, not a more general time-management problem. Mr. Kibuuka is presently doing independent written work under my supervision. His concern is the regulation of the internet. When I agree to supervise a student, we agree on a timeline for doing various steps in the project. Inevitably, the student falls behind. Mr. Kibuuka, is the welcomed exception. He was supposed to have an abstract at the beginning of the semester. I received his abstract the week before the semester started. He was two weeks early with a draft of his section on existing law. In short, the evidence indicates that when Mr. Kibuuaka performs normal tasks under normal time pressures, he is exceptionally responsible. He simply failed to manage his time well in a three hour law examination, which had some unique features. On the assumption that a clerkship will not included short timed exercises, Mr. Kibuuka can be trusted to perform every assigned task in the allotted time.

Mr. Kibuuka's promised paper identifies an interesting and important problem in free speech law. The Communications Decency Act, the primary vehicle for the regulation of speech on the internet was, as the name indicates, primarily aimed at obscenity and pornography. As such, the statute deals only indirectly with the issues of hate speech that now saturate cyberspace. Worse, the first amendment law of hate speech was made at a time when speech was largely effervescent. As Justice Jackson pointed out in 1951, if a speech made at that time did not have an immediate effect, the speech was highly likely to have no effect and never be rememberd. The internet keeps speech alive. A call for genocide issued today by an obscurity living in Cleveland may inspire a murderer in Ghana two years later. Free speech and internet law has not yet caught out with the times. Mr. Kibuuka is thinking and thinking clearly what such a law might look like in the twenty-first century. He has forgotten more than I know about the internet and teaching me everyday about the technologies. His paper promises to similarly educate the legal public.

Mr. Kibuuka is an excellent candidate for a federal and judicial clerkship. He excelled at the University of Baltimore School of Law before transferred to Maryland Carey Law. He had a strong first semester at Maryland, minus the grade in my course, which was entirely the result of a unique time management problem. He speaks and writes clearly. He demonstrated a mastery of doctrine when speaking in my class and demonstrates even greater mastery when describing the caselaw on regulation of the internet. I have never had to ask Mr. Kibuuka to explain what he is saying or writing. The prose is both sophisticated and readable. While he needs some work on his examination time-management skills, in normal human situations he is an exceptionally responsible

Mark Graber - mgraber@law.umaryland.edu - (410) 706-2767

young adult. Mr. Kibuuka is a self-starter who will consistently be part of the solutions in your chambers and never part of the problem. For all these reasons, he has my strong recommendation for a federal or state judicial clerkship.

If there is more information you need about this outstanding young student, I can be reached at the University of Maryland Carey School of Law (500 W. Baltimore Street, Baltimore, MD 21201), at 410-607-2767 (during the pandemic, my home number, 301-588-0119, is probably better) or at mgraber@law.umaryland.edu. Thank you for your kind consideration.

Yours truly,

Mark A. Graber
Regents Professor
University of Maryland Carey School of Law

This writing sample was from the 2023 Myerowitz Moot Court Competition. It was part of my submitted appellate brief. It has been condensed into the case summary, questions presented, and argument for brevity purposes.

CASE SUMMARY

Five years ago, the City of Pawnee suffered a significant loss, as the mini horse "Lil Sebastian" passed away. R. at 4. The horse was a local legend, and his death caused riots in Pawnee. *Id.* The Pawnee Police Department ("PPD") responded by implementing First Amendment training for PPD officers to address future riots adequately. *Id.* Two years ago, Petitioner Ron Swanson anonymously created a Facebook page purporting to be the PPD's official Facebook page. R. at 2. Petitioner took care to make the fake page nearly identical to the official PPD page, mirroring the official name, profile picture, and cover picture of the official PPD page. *Id.*

Petitioner posted six times on the fake PPD page, with each post causing either confusion and concern or laughter. R. at 3. PPD officers were concerned and alerted to the fake page because the page's information was false. R. at 3. Thus, PPD officer, Officer Burt Macklin, appeared on "Ya Heard? With Perd!," a local television show, and stated that the creator of the fake page would be "found and brought to justice." *Id.* This alerted Petitioner of the pending investigation. *Id.* It was only then that Petitioner deleted the fake page. *Id.*

Officer Macklin consulted with Officer Bobby Newport, another PPD officer, who identified that Petitioner violated a local statute prohibiting using computers to disrupt police functions. *Id.* The officers subsequently arrested Petitioner. R. at 4. At trial, Petitioner was acquitted and filed two claims, alleging that the arresting officers, Macklin and Newport, violated Petitioner's free speech rights and that the City of Pawnee had inadequately trained its police officers. *Id.* These claims are at issue: (1) qualified immunity for officers Macklin and Newport; (2) municipal liability for the City of Pawnee.

QUESTIONS PRESENTED

I. PPD officers arrested Petitioner for creating a fake online Facebook page mirroring the official PPD Facebook page. R. at 2. The page confused Pawnee residents, leading some to believe stealing was legal. R. at 11. Nonetheless, Petitioner avers the arrest was in retaliation for exercising his constitutional rights. R. at 4. Are the arresting officers shielded from liability for retaliatory arrest under the doctrine of qualified immunity?

II. Whether a city is municipally liable for failing to train its police officers on the First Amendment when the City's police officers have yet to violate the city residents' constitutional rights.

ARGUMENT

I. POLICE OFFICERS BURT MACKLIN AND BOBBY NEWPORT ARE ENTITLED TO QUALIFIED IMMUNITY.

A party seeking relief under 42 U.S.C. § 1983 must establish that the alleged offenders, "under color" of law, violated the claimant's federal Constitutional or statutory rights, resulting in injury. 42 U.S.C. § 1983. However, qualified immunity "shields government officials" in such cases from undue interference or hindering of official or discretionary duties. *Reichle v. Howards*, 566 U.S. 658, 664 (2012); *see also Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.").

When analyzing whether a defendant is entitled to qualified immunity, courts consider two prongs: (1) whether the facts alleged, construed most favorably to the claimant, establish a constitutional violation; and (2) whether that right was "clearly established" at the time the alleged misconduct occurred. *Id.* A right is "clearly established" when a reasonable official would have known that the official's acts violated that right. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) ("In other words, existing precedent must have placed the statutory or constitutional question beyond debate.").

Furthermore, even when a purported right is established, an official is entitled to qualified immunity if the official establishes that he acted reasonably. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (holding that if the petitioner can prove that a reasonable officer would have believed that the warrantless search of the respondent's home was lawful, the petitioner is entitled to qualified immunity). Lastly, the analysis is not sequential; courts may grant qualified immunity solely under the second prong "without resolving the often more difficult question [of]

whether the purported right exists at all." *Reichle*, 566 U.S. at 664; *see also Ashcroft*, 563 U.S. at 735 (noting that courts should be cautious about consuming judicial resources to resolve difficult constitutional questions that have no bearing on the outcome of a case). Failure to meet either prong results in qualified immunity for the alleged tortfeasor. *Pearson*, 555 U.S. at 232.

A. Petitioner Is Asserting a Constitutional Right to Be Free From An Arrest Supported By Probable Cause.

Petitioner here asserts a claim against officers Macklin and Newport, arguing that Petitioner had a constitutional right to be free from retaliatory arrest under the First Amendment, pursuant to 42 U.S.C. § 1983. R. at 5. But this misses the mark. If the arrest is supported by probable cause, then the retaliation claim is irrelevant. *Karns v. Shanahan*, 879 F.3d 504, 522 (3d Cir. 2018); *but see Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019) (holding that if officers have probable cause for a particular crime but the claimant proves officers do not ordinarily arrest violators of the relevant statute, the retaliation claim should be allowed to proceed). Therefore, the right to be free from an arrest supported by probable cause is the underlying right in Petitioner's claim.

The district court identified that Petitioner's Facebook page here was a parody, thereby protected under the First Amendment. *Swanson v. Macklin*, 455 F. Supp. 7th 25, 21 (D. Harvest. 2021); *see generally Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56–57 (1988) (identifying parodies as protected speech); *see also* U.S. CONST. amend. I. However, that court neglected to address whether the arrest was otherwise supported by probable cause. This is important because if an arrest alleged to be made in retaliation is supported by probable cause, this Court has upheld it. *Reichle*, 566 U.S. at 669. Essentially, probable cause provides a constitutional basis that, if proven, justifies the arrest. *Id.* at 665.

B. There Is No Established Constitutional Right To Be Free From An Arrest Supported By Probable Cause.

This Court addressed the right to be free from a retaliatory arrest supported by probable cause in *Reichle v. Howards*. 566 U.S. at 669. There, the plaintiff sued Secret Service ("SS") agents for a retaliatory arrest. *Id.* at 659. The arrest had been made after the SS agents observed the plaintiff encounter a former United States Vice President and thereby deemed the plaintiff a threat. *Id.* This Court ruled against the plaintiff, holding that there is no clearly established right to be free from a retaliatory arrest supported by probable cause. *Id.* at 666. This Court observed that prior precedent barring claims for retaliatory prosecution was unclear regarding retaliatory arrests. *Id.* And so, reasonable officers like the SS agents were likely to question whether the rule against retaliatory prosecution applied to retaliatory arrests. *Id.*

Here, because officers Macklin and Newport had probable cause to arrest Petitioner, they are entitled to qualified immunity.

1. The arrest was supported by probable cause.

Officers Macklin and Newport had probable cause to arrest Petitioner. Courts employ an objective test to determine whether an arrest is supported by probable cause. *Karns*, 879 F.3d 523. The analysis draws on the "facts available to the officers at the moment of arrest." *Id.* (quoting *Beck v. Ohio*, 379 U.S. 89, 96 (1964)). Probable cause is a question for the jury. *Id.* Still, a court may conclude—as a matter of law—whether the evidence before that court, when viewed in favor of the plaintiff, would not reasonably support a contrary factual outcome. *Id.* When conducting this analysis, a court assesses the statute's elements and whether they match the arrest to determine whether the arresting officers had met probable cause. *Id.*

The relevant statute here is as follows: Pawnee Revised Code § 300.12(a): "No person shall [1] *knowingly* [2] use any *computer*, computer system, computer network,

telecommunications device, or *other electronic device* or system or the *internet* [3] so as to disrupt, interrupt, or impair the functions of any *police*, fire, educational, commercial, or governmental operations." (emphasis added). Petitioner's claim fails on all three elements.

First, Petitioner knew of his acts. Petitioner "anonymously created a Facebook page parodying the" PPD. R. at 2. He mirrored the official PPD page, using the "same name, profile picture, and cover picture" as the PPD page. R. at 2. In doing so, Petitioner would have exhausted resources such as time to research the PPD official Facebook page to guarantee similar likeness. Moreover, after the PPD warned of investigating the fake page, Petitioner copied the PPD's warning onto his fake PPD page. R. at 3. He then deleted the page only after Officer Macklin stated that "the creator of the parody page would be found and brought to justice…." R. at 4. These actions were voluntary and evinced knowledge of criminality. *See Forster v. United States*, 237 F.2d 617, 620 (9th Cir. 1956) ("An act is done knowingly if done voluntarily and purposely…." (internal quotation marks omitted)).

Secondly, Petitioner used several enumerated mediums to violate Pawnee Revised Code § 300.12(a). One of these was Facebook. R. at 2. Facebook is an internet telecommunications platform. Mark Hall, *Facebook*, ENCYCLOPEDIA BRITANNICA (Feb. 06, 2023, 3:47 PM), https://www.britannica.com/topic/Facebook. It therefore meets at least one category within the statute: the internet. PAWNEE REV. CODE § 300.12(a). Petitioner used Facebook to create his page and thereby met the second element. R. at 2. Additionally, his arrest record states that he used "a computer to disrupt police operations." R. at 13. A computer is another of the enumerated mediums of the violated statute, and in using it, Petitioner satisfied the second element. PAWNEE REV. CODE § 300.12(a).

Thirdly, Petitioner disrupted and impaired the functions of the police. The record stated that because of Petitioner's Facebook posts, Pawnee citizens made ten calls to the PPD concerned and confused after seeing Petitioner's posts. R. at 12. Despite the calls coming from a non-emergency phone line, they were made repeatedly in just two days, requiring officers to appear on multiple local shows to discuss the pending investigation. R. at 12. For example, the PPD police chief, Ben Wyatt, appeared on the show "Pawnee Today[,]" to specifically discuss the fake Facebook page investigation. R. at 3. Likewise, PPD officers lost opportunities to undertake other police tasks during the times the PPD was responding to Petitioner's crime, evidencing disruption under the third element.

Similarly, Petitioner's actions led to the FBI's involvement in the PPD investigation. R. at 3. Officer Macklin relied on his friend within the FBI as a resource to devote toward investigating Petitioner. *Id.* Not only was that diverting PPD officers but also federal officers in the FBI from other opportunities, implicating two separate "police" organizations. The statute does not limit the affected "police" to the PPD. PAWNEE REV. CODE § 300.12(a). In essence, Petitioner was doubly violating the statute because he cost the FBI and the PPD opportunities to undertake other official tasks. Resultantly, Petitioner met the third element of PAWNEE REV. CODE § 300.12(a).

Given that Petitioner violated the statute, probable cause to arrest him was plausible. In arresting him, the officers were not violating any "clearly established" right to be free from an arrest otherwise supported by probable cause. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (holding that because warrantless wiretaps were not unconstitutional when the government used them, the government did not violate an established constitutional right). If such a right now exists, it did not at the time of the arrest. *See Mitchell*, 472 U.S. at 535 ("[O]fficials performing

discretionary functions are not subject to suit when such questions are resolved against them only after they have acted."); *see also Anderson*, 483 U.S. at 640 ("[O]ur cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense….").

2. Even if probable cause was not met, officers Macklin and Newport acted reasonably.

Assuming arguendo that probable cause did not exist, PPD officers Macklin and Newport are still entitled to qualified immunity because they acted reasonably in arresting Petitioner. Officers who "reasonably but mistakenly conclude that probable cause is present" are entitled to qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). This is because public policy is better served in protecting against potential criminality, albeit actions mistaken for criminality, before the crime affects more citizens. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982) ("[W]here an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences." (internal quotations omitted)).

Here, the officers' actions were reasonable. The calls to the PPD regarding the fake page placed them on high alert. R. at 3. For example, one caller assumed stealing was legal thanks to Petitioner's post validating stealing on the fake page. R. at 7. PPD Officer J. Jamm immediately informed the caller that stealing was a crime. R. at 11. A reasonable mind could conclude that Petitioner's misinformation promoted crime as the caller may have relied on it to steal. Likewise, Officer Macklin "properly applied for and obtained a search warrant for" Petitioner's cabin. R. at 3. The search yielded the computer indicating Petitioner as the fake PPD Facebook page creator. R. at 12. Obtaining a warrant requires probable cause to search the area listed, which a neutral magistrate must approve. U.S. CONST. amend. IV. These actions by PPD officers showed the

officers were not randomly arresting Petitioner, but rather acting accordingly. Hence, Petitioner's arrest was reasonable.

Any "mistakes" the officers allegedly made are of no moment. This Court has addressed potential errors, holding that officers can make mistakes in the interest of justice. *See Anderson*, 483 U.S. at 641 ("We have recognized th[e]…inevitab[ility] that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials…should not be held personally liable."). Likewise, qualified immunity balances such costs. *Id.* at 638 (highlighting that qualified immunity accommodates the social costs of unduly inhibiting officials executing official duties). Officers Macklin and Newport here acted reasonably in investigating and arresting Petitioner. If this Court finds the officers lacked probable cause to conduct the arrest, the officers are still entitled to qualified immunity, given that the investigation and arrest were objectively reasonable.

II. THE CITY OF PAWNEE ADEQUATELY TRAINED THE CITY POLICE OFFICERS.

The City's police officers were adequately trained, and the City should not be held municipally liable under 42 U.S.C. § 1983. Congress intended § 1983 liability to apply to municipalities and all other local governments as included among the "person[s]" enumerated within the statute. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978); *see also* 42 U.S.C. § 1983 (permitting civil suit against any person acting under municipal authority that deprives another individual of that individual's rights guaranteed by the Federal Constitution and federal laws). Municipality liability under § 1983 is established when the "municipality itself" causes the alleged constitutional violation. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989); *see also Connick v. Thompson*, 563 U.S. 51, 60 (2011) (emphasizing that municipalities are only responsible for illegal municipality actions).

Courts assessing municipal liability examine whether there is a "direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *Id.* Both constitutional and unconstitutional municipal policies are actionable under § 1983. *Id.* If a municipal policy is constitutional but unconstitutionally applied by a municipal employee, the municipality is liable if the employee was inadequately trained and the inadequate training caused the constitutional wrong. *Id.* at 387. Such § 1983 inadequate training ("failure to train") claims succeed in only limited circumstances. *Id.*; *Connick*, 563 U.S. at 61 ("A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train."). Lastly, when alleged against a municipality, liability for failure to train police officers is only established when the inadequacy amounts to "deliberate interference" to the rights of those with whom the police encounter. *Id.* at 388.

Accordingly, Petitioner must prove: (1) the municipality employed an inadequate training program as part of the municipality's policy; (2) the municipality was "deliberately indifferent" to the constitutional violations of its inadequate training program; and (3) the municipality's inadequate training program actually caused the injury giving rise to the § 1983 claim in the case *sub judice*. *City of Canton*, 489 U.S. 378; *see generally Marcilis v. Twp. of Redford*, 693 F.3d 589, 605 (6th Cir. 2012) ("To prevail on a failure to train…claim, the plaintiff must prove the following: (1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury." (internal quotation marks omitted)). Here, Petitioner did not meet the requisite elements.

A. The Pawnee Police Department Employed an Adequate Training Program For Pawnee Police Officers.

Before assessing the adequacy element, courts first establish that the policy at issue was the municipality's official policy. *Connick*, 563 U.S. at 61. This is demonstrated in three circumstances: (1) when the municipality's local government enacts a lawmaking decision; (2) acts by the municipality's policymakers; and (3) acts performed throughout the municipality that are essentially its custom, carrying the force of law. *Id.* With each circumstance, the municipality is the actor. *Id.*

Turning to the first element—adequacy—courts look to the tasks performed by the employees (in this case, officers) and how the deficient program impacts the officers' tasks. *Id.* at 390. The program must have applied overtime to multiple employees. *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 407 (1997). Similarly, a training program is not inadequate for failure to train claims when a single employee acts out because liability in such circumstances would entail *respondeat superior* liability. *Cf. Taber v. Maine*, 67 F.3d 1029, 1037 (1995) (defining *respondeat superior* liability generally as employer liability for any faults of the employer's employees); *see also Monell*, 436 U.S. at 691 ("[A] municipality cannot be held liable under § 1983 on a respondeat superior theory.").

Here, the allegedly deficient training policy was Pawnee's failure to "sufficiently train its officers on the First Amendment." R. at 5. The policy includes the PPD training all its first-year officers on the First Amendment and an additional four-hour constitutional law training which may consist of the same first-year First Amendment training. R. at 4, 14. The training is limited to officer behavior during protests. *Id.* The PPD policy is hence considered a Pawnee custom or policy that essentially carries the force of law because the city mandates it for its police officers. *See Connick*, 563 U.S. at 61; R. at 14.

Petitioner is unsatisfied with the PPD policy and calls on the department (as a municipality actor) for more. R. at 4. But the First Amendment training was implemented in response to riots after the death of "Lil Sebastian[,]" a "mini horse" that was a Pawnee local legend. R. at 4. Pawnee has never struggled with other First Amendment issues nor other constitutional violations since implementing the policy five years ago. R. at 4; *City of Canton*, 489 U.S. at 390 (observing that the adequacy of a police training program focuses on the program's relation to the tasks that the city's officers perform). Therefore, the PPD responded adequately to the town's needs by enacting a policy that was relevant and impactful to the Pawnee locals. R. at 14.

B. Because The Pawnee Police Department Training Program Was Adequate, The City of Pawnee Could Not Be On Notice Of Unconstitutional Behavior By Police Officers.

Nor can Petitioner establish that the PPD was "deliberately indifferent" to any constitutional violations of its allegedly inadequate training program. *City of Canton*, 489 U.S. at 378. The "deliberately indifferent" standard is a stringent standard of fault that requires a showing that the municipal actor ignored the potential consequences of its actions. *Connick*, 563 U.S. at 61. This standard is met when the municipal actors are on notice for policies (or lack thereof), causing municipal employees to behave unconstitutionally toward citizens. *Id.* In such instances, the municipal actors are deemed "indifferent" toward the constitutional violations, compounding into the entire municipality violating the Constitution. *City of Canton*, 489 U.S. at 395. Additionally, claimants must display a pattern of constitutional violations resulting from the allegedly deficient policy, otherwise, the municipality cannot be deemed on notice of the alleged deficiency. *Comm'rs of Bryan Cnty.*, 520 U.S. at 409. However, courts may find a single instance of inadequate training sufficient to meet the "deliberately indifferent" standard when the

failure to train is "so obvious" that the municipality can be said to have been "deliberately indifferent" to that deficiency. *Id.*

Here, Pawnee did not have a single case of the PPD policy, causing police officers to engage in unconstitutional misbehavior toward Pawnee residents.[1] Thus, there was no pattern of unconstitutional violations by the PPD regarding Pawnee residents' First Amendment rights, negating the municipality's potential notice of such violations. *See Connick*, 563 U.S. at 62 ("Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights."). This Court has never found a single instance of deficient training equating to a "deliberately indifferent" municipality. It should not do so here.

C. Pawnee's Police Training Policy Did Not Cause Swanson's Alleged Injury.

Finally, Petitioner cannot show that the municipality's allegedly deficient policy actually caused any injury. *City of Canton*, 489 U.S. at 390. Petitioner must establish that the municipality was the "driving force" behind the injury and that the municipality intentionally deprived Petitioner of a federal right. *See Comm'rs of Bryan Cnty.*, 520 U.S. at 404 ("[A] plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal activity and the deprivation of federal rights."). Petitioner cannot prove any such deprivation.

[1] The closest the record came to the PPD violating Pawnee residents' First Amendment rights was the training for city protests. R. at 4. For this Court to hold this case's single alleged instance "so obvious" to render Pawnee "deliberately indifferent" would significantly lower this stringent standard. *See City of Canton*, 489 U.S. at 387 (hypothesizing that in a narrow set of circumstances, a failure to train claim may succeed without a pattern of constitutional violations if it is highly predictable that law enforcement's failure to furnish adequate tools to officers would result in constitutional violations).

When a claimant does not claim that the municipality directly inflicted injury upon the claimant, the municipal liability standard to be met is heightened to avoid *respondeat superior* liability. *See Connick*, 563 U.S. at 70 ("[P]roving that a municipality itself actually caused a constitutional violation by failing to train the offending employee…[requires] a stringent standard of fault, lest municipal liability under § 1983 collapse into respondeat superior."). Like the "deliberate indifference" element, a pattern of constitutional violations is pertinent to this analysis. *Comm'rs of Bryan Cnty.*, 520 U.S. at 408–09. This pattern makes it more likely that because the municipality previously acquiesced to similar violations, it followed suit in the instant case. *See id.* (observing that where the plaintiff points to "no other incident tending to make it more likely that the plaintiff's own injury flows from the municipality's action," it is not "readily apparent that the municipality's action caused the injury in question[]").

Here, Petitioner is not arguing that Pawnee, as a municipality, directly caused his alleged injury. R. at 5. Rather, Petitioner avers that a failure to train PPD officers on the First Amendment caused his alleged injury. *Id.* This purported injury was the arrest after creating and posting on the Facebook page, in which Petitioner believed he was exercising his First Amendment rights. R. at 4. As seen in the record, no First Amendment violations resulted from the PPD implementing its constitutional training policy before Petitioner's allegations. R. at 4. Consequently, there is no direct cause from or past instances of the PPD policy inflicting a single, let alone a similar alleged injury to Petitioner or other Pawnee residents. Moreover, even if the policy caused Petitioner's arrest and trial, there was a separate cause for his arrest. R. at 4. He was charged with committing a felony. R. at 4. If the PPD reasonably believed Petitioner committed that felony, the PPD would be required to arrest Petitioner. *See* PAWNEE REV. CODE

§ 300.12(a); *see also* 18 U.S.C. § 4 (criminalizing concealment of or knowledge of the commission of a felony without reporting such crime).

It must be reiterated that succeeding on a failure to train claim is a high burden. *See Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1328 (11th Cir. 2015) ("In limited circumstances, a local government's decision not to train certain employees…to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983.") (quoting *Connick*, 563 U.S. at 61). Moreover, officers are not flawless. *See City of Canton*, 489 U.S. at 391 ("[A]dequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable."). Finally, additional training does not guarantee fewer errors. *See Connick*, 563 U.S. at 68 (highlighting that although demonstrating that additional training may be helpful to officers in making a difficult decision, that does not establish municipal liability). Hence, the PPD's policy here was adequate and this Court should affirm the district court's grant of a motion for summary judgment on the municipal liability issue.

Applicant Details

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Contact Phone Number	**9195925447**

Applicant Education

BA/BS From	**American University**
Date of BA/BS	**May 2019**
JD/LLB From	**University of Maryland Francis King Carey School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=52102&yr=2011**
Date of JD/LLB	**May 16, 2024**
Class Rank	**30%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Honorable Jamar K. Walker:

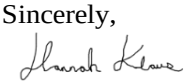
I am a rising third-year law student at the University of Maryland Francis King Carey School of Law School. I am writing to apply for a 2024-2045 judicial clerkship in your chambers. I am interested in a one-year term clerkship. This clerkship would be an incredible opportunity to serve the community of Virginia and prepare for a career in public interest litigation in the Southeast region. I am taking a course on federal courts this fall.

I have demonstrated stellar research, writing, analytical skills, and attention to detail throughout my professional and law school careers. I will offer these skills and an outstanding work ethic as a judicial clerk. Prior to law school, I flexed my research, writing, and persuasive communication skills as the Distributed Organizing Associate at Greenpeace. In that role, I led volunteers in getting out the vote for environmental candidates by researching state voting laws and writing concise and persuasive textbanking campaign scripts that reached over 2 million voters. In my law school experience, I further refined my skills through several legal research and writing courses in which I produced legal memoranda, appellate briefs, and seminar papers. For example, I wrote a thorough legal analysis on the public participation requirements of the Clean Water Act for a seminar course last semester.

I continue to refine my legal research and writing skills through legal internship experiences. This spring semester, as a legal extern with the Earthjustice California Regional Office, I supported attorneys in preparing for several active litigation matters by researching and writing legal memoranda on complex civil and environmental issues. In one assignment, I prepared a memorandum in which I advised attorneys on which parties must be named as real parties in interest. Last summer, as the legal intern for the Center for Progressive Reform, I supported advocacy for low-income utility ratepayers in North Carolina by researching the dockets of the North Carolina Utilities Commission and summarizing my findings to report back to my supervisor. This summer, I am interning for the Southern Environmental Law Center where I am applying my legal research and writing skills and immersing myself in case and project management. I am confident that my practical legal experience and education will allow me to skillfully and efficiently research, draft, and proofread opinions and provide support in preparation for oral arguments while applying expert attention to detail.

I am eager to serve as a Judicial Clerk in your chambers. I would appreciate the opportunity to meet with you to discuss my interest and qualifications for this position. Thank you for your time and consideration.

Sincerely,



Hannah Klaus

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EDUCATION

University of Maryland Francis King Carey School of Law, Baltimore, MD
Juris Doctor Candidate, May 2024
GPA: 3.60
Activities: National Lawyers Guild Maryland Carey Law Student Chapter: Co-President (2023-current); Legal Observer Coordinator (2022-2023); 1L Student Representative (2021-2022); University of Maryland Legislative Law Association: Treasurer (2022-2023); Maryland Environmental Law Society: Community Outreach Coordinator (2023-current); Barbri Student Representative

American University, Washington, DC
Bachelor of Arts in Environmental Studies and Economics (International Track) and Minor in Spanish, May 2019
Study Abroad: Universidad Nacional de Costa Rica (February- June 2018)
Work Study: American University Student Center, *Operations Assistant* (August 2016- July 2019)
Activities: College of Arts and Sciences Communications and Marketing, *Student Writer* (August 2015- May 2016)
Fossil Free American University, *Student Organizer*

EXPERIENCE

Southern Environmental Law Center, Chapel Hill, NC
Law Clerk, May 2023- Current
- Support attorneys with environmental advocacy and preparation for active litigation matters by conducting research and writing legal memoranda on complex civil and environmental issues

Earthjustice California Regional Office, Remote position
Legal Extern, January 2023- April 2023
- Supported attorneys with preparation for active litigation matters by conducting research and writing legal memoranda on complex civil and environmental issues
- Participated in committee and staff meetings; moots of oral arguments; and interviews of expert witnesses

Center for Progressive Reform, Washington, DC
Legal Intern, May 2022- August 2022
- Researched North Carolina Utilities Commission dockets and wrote a blog post advocating for low-wealth ratepayers
- Revised the Maryland Climate Equity Act to prepare it to be reintroduced in the 2023 legislation session

Greenpeace USA, Washington, DC
Distributed Organizing Associate, January 2020- July 2021
Supporter Mobilization Assistant Fellow, July 2019- January 2020
- Led volunteer team in contacting over 2 million voters in the 2020 general election
- Researched state voting laws and wrote persuasive textbanking scripts to get out the vote for climate leaders
- Coached a team of 12 volunteer leaders, managed online volunteer platform, and hosted monthly volunteer calls

The Climate Reality Project, Washington, DC
Engagement Chapter Support Team Intern, January 2019- April 2019
- Researched and created a report of the social justice outcomes of carbon pricing for 10 states
- Grew the national Climate Reality Chapters program by providing direct support to local climate action groups

CleanAIRE Carolina, Raleigh, NC
Air Quality Health Specialist Intern, June 2018- August 2018
- Created educational materials on air quality and patient health for physicians
- Contributed to 13 ArcGIS StoryMap North Carolina county air quality reports

Environmental Protection Agency, National Center for Environmental Research, Washington, DC
Communications Intern, September 2017- December 2017
- Wrote and edited press kits, including press releases and social media posts on EPA funded research

LANGUAGE SKILLS & ADDITIONAL EXPERIENCE

Spanish, Intermediate Conversational, Reading, and Writing Skills
Sunrise Movement, *Volunteer* (Washington, DC and Baltimore, MD), November 2018- Present
Youth Empowered Solutions, *Youth Staff* (Raleigh, NC), July 2012- December 2017
The Climate Institute, *Blog and Social Media Manager* (Washington DC), August 2016- December 2016

PUBLICATIONS AND RESEARCH

Klaus, H. (2015) Youth Empowerment to Achieve Patient Engagement. *North Carolina Medical Journal* vol. 76 no. 3 187 188

Patricia A. Scott
University Registrar
University of Maryland, Baltimore

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Current Program
Major : Law
Maj/Concentration : Law Cardin Required

INSTITUTION CREDIT:

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Fall 2021						
LAW	527A	CIVIL PROCEDURE	4.00	B+	13.32	
LAW	530A	CONTRACTS	4.00	A	16.00	
LAW	535A	TORTS	4.00	A	16.00	
LAW	550A	INTRODUCTION TO LEGAL RESEARCH	1.00	B+	3.33	
LAW	564A	LAWYERING I	3.00	B	9.00	
		Ehrs: 16.00 GPA-Hrs: 16.00 QPts:	57.65	GPA:	3.60	
Spring 2022						
LAW	506A	CRIMINAL LAW	3.00	B	9.00	
LAW	515U	LAW AND SOCIAL CHANGE	3.00	A-	11.01	
LAW	528A	CON LAW I: GOVERNANCE	3.00	A-	11.01	
LAW	534A	PROPERTY	4.00	B+	13.32	
LAW	565A	LAWYERING II	3.00	A-	11.01	
		Ehrs: 16.00 GPA-Hrs: 16.00 QPts:	55.35	GPA:	3.46	
Fall 2022						
LAW	501F	ADMINISTRATIVE LAW	3.00	A+	12.99	
LAW	529A	CON LAW II: INDIVIDUAL RIGHTS	3.00	B+	9.99	
LAW	556B	ENVIRONMENTAL LAW	3.00	A	12.00	
LAW	572C	BUSINESS ASSOCIATIONS	3.00	A-	11.01	
LAW	581G	ELS: CLEAN WATER ACT	3.00	B+	9.99	
		Ehrs: 15.00 GPA-Hrs: 15.00 QPts:	55.98	GPA:	3.73	
Spring 2023						
LAW	535S	ENVIRON LAW EXTERNSHIP WKSP	1.00	CR	0.00	
LAW	540U	ALR: ENVIRONMENTAL LAW (DIS)	1.00	A-	3.67	
LAW	578F	EVIDENCE	3.00	B+	9.99	

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
LAW	580B	FAMILY LAW	3.00	A-	11.01	
		Ehrs: 8.00 GPA-Hrs: 7.00 QPts:	24.67	GPA:	3.52	
IN PROGRESS WORK						
LAW	579B	EXTERNSHIPS	4.00	IN PROGRESS		
		In Progress Credits 4.00				
Fall 2023						
IN PROGRESS WORK						
LAW	504R	ENVIRONMENTAL ADVOCACY	2.00	IN PROGRESS		
LAW	508R	ENERGY LAW	2.00	IN PROGRESS		
LAW	557B	ENVIRONMENTAL LAW CLINIC	6.00	IN PROGRESS		
LAW	558D	LEGAL PROFESSION	2.00	IN PROGRESS		
LAW	583F	FEDERAL COURTS	3.00	IN PROGRESS		
		In Progress Credits 15.00				

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	55.00	54.00	193.65	3.59
TOTAL TRANSFER	0.00	0.00	0.00	0.00
OVERALL	55.00	54.00	193.65	3.59

********** END OF TRANSCRIPT **********

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to enthusiastically recommend Hannah Klaus for a clerkship position. I think she would be an excellent clerk. I met Hannah in January 2022 while co-teaching a course called Law and Social Change in which she was enrolled.

Hannah has excellent analytical, research, and writing skills. As a major part of the first-year course, students identified a major problem in Baltimore and Maryland, did comprehensive legal and factual research about it, developed and justified a reform plan, and described how they would implement the plan.

Hannah and two other students, working in a team, took on homelessness and the need for affordable housing as their interrelated projects. Their project was excellent—one of the best in the class. In this project, Hannah demonstrated many of the skills a good clerk needs, e.g., the abilities to identify an issue, to do in-depth research to address it, to synthesize law and facts, and to write in a very clear and persuasive way. Her research, writing, and analysis all were terrific!

From this project, and her interactions with her teammates, it is apparent both that Hannah works well in teams and is a team leader. She is a modest leader who supports teammates and quietly leads. She helped to organize the team, apportion tasks, and plan meetings with me and my co-teacher. She earned an A- grade in the course, in large part because of her excellent work on this project.

One of the striking things about Hannah's background is the wide variety of research and writing projects in which she has engaged. These have been in her extensive and impressive experiences prior to law school, in law school, and in summer positions while in law school. She has researched and written major reports, policy papers, educational materials, and legal memoranda and briefs.

Hannah's research and writing has been in the environmental field, as her resume indicates, often about complex issues that involve law, policy, and science. The research, analytical, and writing skills she has developed in this context, as well as her ability to work well with others, will serve her well in a judicial clerkship.

Hannah also has been an important student leader at the law school in several different organizations, including as Treasurer of the University of Maryland Association of Legislative Law, a nonpartisan organization focused on policy, politics, and legislation, and the roles they play in our legal system.

In sum, Hannah is an outstanding law student. She has all the skills and personal attributes of a superb judicial clerk!

Very truly yours,
Michael Millemann
Jacob A France Professor of Law
University of Maryland-Carey School of Law
500 W. Baltimore St.
Baltimore, MD. 21201
410-294-0954

Dear Judge

I am pleased to recommend Hannah Klaus for a clerkship with you.

Hannah was a student in my Environmental Law class during the fall semester 2022. This class involves very complex regulatory materials that students usually find quite challenging. Hannah had no difficulty mastering these materials and was one of the most effective members of the class.

Through her postings on the class website's Discussion Board it became apparent that Hannah has a keen appreciation not only for black letter law, but also for the various economic and political forces that shape how law is implemented and enforced. This was reflected in the short paper Hannah wrote on "The Intersection of the Labor and Environmental Justice Movements in the United States." In this paper she examined efforts by industry groups to drive a wedge between environmentalists and working people as well as the common ground these interests share in benefiting from regulatory statutes.

I was not surprised when Hannah wrote a terrific final exam that earned her one of the 9 grades of "A" that I awarded in a class of 39 students.

Hannah has been relentless at obtaining experience through a variety of internships and summer employment that may account for her sophisticated understanding of the impact of law on policy. She also has excellent research and writing skills that will help make her a terrific law clerk. I recommend her with the highest enthusiasm.

Sincerely,

Robert V. Percival
Robert F. Stanton Professor of Law
Director, Environmental Law Program

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to submit this letter of recommendation for Hannah Klaus, whom I had the pleasure of supervising during the Spring 2023 semester in her position as a law clerk with the California Regional Office of Earthjustice. I believe that Hannah is an excellent candidate for a judicial clerkship, and wholeheartedly endorse her for a position with your chambers.

Earthjustice is a non-profit law organization that specializes in environmental law and administrative advocacy in pursuit of a healthy environment. We work to protect natural resources, combat climate change, and defend the rights of communities and wildlife that experience environmental harm. The California Regional Office of Earthjustice focuses on confronting environmental justice issues, including advocating for communities affected by air pollution and farmworker communities exposed to pesticides. Our office also specializes in the protection of endangered species and the preservation of public lands.

Hannah was a thoughtful and diligent law student during her time working with me this past spring. She consistently demonstrated a deep understanding of environmental issues, and an eagerness to explore thorny legal questions. During her time with us, she explored complex civil procedural issues for our office, including the requirements for notice under the federal Endangered Species Act, and the requisite parties to be named in a future lawsuit involving pesticide compliance. Her analytical skills allowed her to home in on the core issues presented, and she asked thoughtful questions to ensure her research would be useful to the attorneys supervising each assignment.

Moreover, I was impressed with Hannah's commitment to ethical conduct. She consistently approached her work with the utmost integrity and was always careful to ensure that her research and analysis were impartial and objective. She was attentive to the need for confidentiality in matters that we are preparing to litigate.

As a former judicial clerk myself, I understand the importance of the role that a clerk plays in assisting a judge in conducting legal research and drafting opinions. Based on my experience working with Hannah, I believe that she possesses the intellectual curiosity, analytical diligence, and commitment to ethical conduct that are essential for success in this role.

In summary, I wholeheartedly endorse Hannah for a judicial clerkship. She is a talented and dedicated individual who would make a valuable contribution to any judge's chambers. If you require any further information, please do not hesitate to contact me.

Sincerely,

Marie Elizabeth Logan, Esq.

Senior Associate Attorney

Earthjustice, California Regional Office

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Writing Sample I

The following is a memorandum I prepared for attorneys during my spring 2023 externship with the Earthjustice California Regional Office. In this memo, I informed attorneys about the law governing the naming of real parties in interest in a petition for writ of mandamus brought under the California Food and Agricultural Code and the California Environmental Quality Act. The recipients of this memo and the summary of facts have been redacted for confidentiality.

MEMORANDUM

TO: [Redacted for confidentiality]

FROM: Hannah Klaus, Legal Extern

DATE: April 6, 2023

RE: Real Parties in Interest in Petition for Writ of Mandamus

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I. Issues

a. When do civil litigants need to name real parties in interest in a petition for writ of mandamus?

b. In a petition for writ of mandamus under the Food and Agricultural Code and the California Environmental Quality Act (CEQA), who qualifies as a real party in interest?

II. Brief Answers

a. The California Code of Civil Procedure requires every action to be "prosecuted in the name of the real party in interest, except as otherwise provided by statute." Cal. Civ. Pro. Code § 367. Civil litigants must name any real parties in interest in a petition for writ of mandamus. *Sonoma Cnty. Nuclear Free Zone '86 v. Superior Court*, 234 Cal. Rptr. 357, 361 (1987) (citing Cal. Civ. Pro. Code § 1088. The Supreme Court of California has defined a real party in interest as "'any person or entity whose interest will be directly affected by the proceeding,' including anyone 'with a direct interest in the result.'" *Zolly v. City of Oakland* 514 P.3d 799, 805 (2022) (quoting *Connerly v. State. Pers. Bd.*, 129 P.3d 1, 6 (2006)).

b. California case law strongly suggests a party is not a real party in interest in a petition for writ of mandamus solely because they are named on a permit. A party is a real party in interest that should be named on a petition for writ of mandamus challenging a permit **if they have a sole or shared property and/or business interest to be benefited by the permit.**

III. [The factual background section has been redacted for confidentiality.]

IV. Analysis

a. Real Parties in Interest in California Civil Litigation

The generally accepted definition of a real party in interest is "a person entitled under substantive law to enforce the right sued on and who generally, but not necessarily, benefits from the action's financial outcome." *Real Party In Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019). The California Code of Civil Procedure requires every action to be "prosecuted in the name of the real party in interest, except as otherwise provided by statute." Cal. Civ. Pro. Code § 367. Civil litigants must name any real parties in interest in a petition for writ of mandamus. *Sonoma Cnty. Nuclear Free Zone '86 v. Superior Court*, 234 Cal. Rptr. 357, 361 (1987) (citing Cal. Civ. Pro. Code § 1088. The California Rules of Court require that "if the petition names as respondent a judge, court, board, or other officer acting in a public capacity, it must disclose the name of any real party in interest." Cal. Rules of Court, rule 8.486(a)(2).[1]

Similar to the Black's Dictionary definition of the term, the Supreme Court of California has defined a real party in interest as "'any person or entity whose interest will be directly affected by the proceeding,' including anyone 'with a direct interest in the result.'" *Zolly v. City of Oakland* 514 P.3d 799, 805 (2022) (quoting *Connerly v. State. Pers. Bd.*, 129 P.3d 1, 6 (2006)).

In *Sonoma County Nuclear Free Zone '86 v. Superior Court*, the California Court of Appeal for the Fifth Appellate District further defined the counters of a real party in interest in civil litigation. 234 Cal. Rptr. 357 (1987). The court stated that a real party in interest "has generally been defined as 'any person or entity whose interest will be directly affect by the proceeding.'" *Id.* at 361 (quoting Cal. Civil Writs (Cont. Ed. Bar 1970) § 10.18, p. 194). However, the court explained that "while the real party in interest is 'usually the other party to the lawsuit . . .,'" it can also be (1) "'the person or entity in whose favor the act complained of operates [sic],'" (2) "'anyone having a direct interest in the result'" *Id.* (quoting Cal. Civil Writs (Cont. Ed. Bar 1970) § 10.18, p. 194), or (3) "'the real adverse party…in whose favor the act complained of has been done.'" *Id.* (quoting *De Lucca v. Price*, 146 Cal. 110, 113 (1905)). In this case, an opponent group to a ballot initiative filed a motion for a peremptory writ of mandate to require the local elections board clerk to accept its late ballot argument. *Id.* at 360. The petition did not

[1] This rule is under Title 8 of the California Rules of Court which covers appellate rules. The applicability of this rule may depend on whether the appeal to [court name redacted] is covered by this Title even though the court is not technically an appellate court.

name the proponent group of the ballot initiative as a real party in interest. *Id.* The court denied the peremptory writ because the proponent group was a real party in interest and the superior court had "no authority to issue a peremptory writ without notice to the real party in interest." *Id.* at 361-63, 365.

The concept of a real party in interest in civil litigation was further fleshed out by the California Court of Appeal for the Sixth Appellate District in *Jasmine Networks, Inc. v. Superior Court*. 103 Cal. Rptr. 3d 426 (2009). The court explained that while the application of Section 367 of the California Code of Civil Procedure is "'superficially concerned with procedural rules, [it] really calls for a consideration of rights and obligations.'" *Id.* at 433 (quoting 4 Witkin, Cal. Proc. 6th *Plead* § 121 (2022)). The court provided an analytical process for determining whether a real party in interest is a necessary party that *should* be joined in civil litigation. *Id.* at 437. In explaining the "strong preference for bringing all genuinely interested parties into a single proceeding and adjudicating all of the affected rights and liabilities at once," the court expressed doubt that concerns about "potentially duplicative or inconsistent obligations should have *any bearing whatever* on a plaintiff's status as 'real party in interest' under section 367." *Id.* To ascertain whether a real party in interest is a necessary party, the court asks "(1) [s]hould that person be joined in the action? (2) [i]f so, *can* he be joined in the action? and (3) [i]f he cannot be joined, does his absence require dismissal in light of the factors referred to above." *Id.* The court explained that only when the third question receives an affirmative answer, or where a party is indispensable, would the absence of another possible claimant "deprive the plaintiff of the right to prosecute his cause of action." *Id.*

b. Parties in Challenges to Permitting Decisions that are Real Parties in Interest and Necessary Parties

Although California case law has not explicitly addressed which parties in an action challenging a permit are real parties in interest, permit challenge cases in which a real party or parties in interest are named are illustrative. In many permit challenges, the respondent is a commission, board, agency, or other decision-making body that approved and issued the permit. *See Voices of the Wetlands v. State Water Res. Control Bd.*, 257 P.3d 81, 86-91 (2011) (State Resources Control Board is respondent in the action that issued the permit at issue); *Friends of Mammoth v. Bd. Of Supervisors*, 502 P.2d 1049, 1051-53 (1972) (en banc) (Board of Supervisors is respondent in the action that issued the permit at issue).

Generally, the real party or parties in interest named in a permit challenge are parties that applied for the permit and either were issued or denied the permit. Additionally, property interests tend to make an operator or agent a real party in interest. Such property interests may include sole or shared title to the property to be benefited by the permit in a personal or business capacity, or a residence on the property to be benefited by the permit. For example, in *Friends of Juana Briones House v. City of Palo Alto*, there was an appeal from a judgment that granted a writ of mandate. 118 Cal. Rptr. 3d 324, 327 (2001). The writ of mandate would set aside the approval of a permit to demolish a historic home and direct the City of Palo Alto to comply with CEQA before considering reissuance of the permit. *Id.* The real parties in interest to the action were individuals who applied for and were issued the permit, and who shared title to the property to be benefited by the permit. *Id.* at 327-31.

In several additional decisions, the California Courts of Appeal have similarly found property owners to a property to be benefited by a permit are real parties in interest. *See also State of California v. Superior Court*, 524 P. 2d 1281, 1284-86 (1974) (en banc) (Real parties in interest to an action challenging a permit to develop land within a coastal zone are two corporations and a partnership that collectively applied for the permit and have a property interest benefited by the permit); *McAllister v. County of Monterey*, 54 Cal. Rptr. 3d 116, 120-22 (2007) (Real parties in interest in an action challenging a permit to construct a single-family dwelling on the Big Sur Coast share title to the property to be benefited by the permit and applied for the permit together); *Sierra Club v. County of Sonoma*, 217 Cal. Rptr. 3d 327, 330-32 (2017) (Real parties in interest to a petition for writ of mandate challenging an erosion-control permit under CEQA were issued this permit and owned the land to be benefited by the permit for a business purpose); *Keep our Mountains Quiet v. County of Santa Clara*, 187 Cal. Rptr. 3d 96, 101-03 (2015) (Real party in interest in a petition for writ of mandate challenging a use permit was the party that was issued the permit and had a residence on the property to be benefited by the permit).

Case law varies as to whether parties with a business interest *and* were the permit applicants, issued the permit, and/or had a property interest in the property to be benefited by the permit are real parties in interest. In *Voices of the Wetlands*, Duke Energy Moss Landing, LCC, and its parent company, Duke Energy North America, LLC, both owned the Moss Landing Power Plant at the time that a National Pollution Discharge Elimination System Permit was issued. 257 P.3d at 107 n.l. Both parties were real parties in interest to a review of a denial of a petition for writ of mandate challenging the permit. *Id.* In *Communities for a Better Environment. v. Bay Area Air Quality Management District*, both Kinder Morgan Energy Partners and its subsidiary,

Kinder Morgan Materials Services, were real parties in interest to a challenge to a permit to operate. 205 Cal. Rptr. 3d 12, 14-16 (2016). Kinder Morgan Materials Services was the operator of the facility benefited by the permit and the party to which the permit was issued. *Id.* However, it is not clear whether Kinder Morgan Energy Partners, the parent company and a real party in interest, had a property interest in the facility or was named on the permit. *Id.*

If an operator or agent has a property or business interest to be benefited by the permit *and* applied for the permit on behalf of the entity, it is more likely that the operator or agent is a real party in interest. However, this is not dispositive. In *Save the Agoura Cornell Knoll v. City of Agoura Hill*, the real parties in interest to an appeal to the issuance of the writ of mandate challenging permits were a limited partnership and its limited partner. 259 Cal. Rptr. 3d 707, 718-19 (2020). The Court of Appeals for the Fourth District of California found the limited partner to be a real party in interest for two primary reasons: (1) the limited partner was "listed as the sole applicant in the City's Notice of Determination for its approval of the project and adoption of the [mitigated negative declaration.]" *Id.* at 752. The court explained that CEQA Section 21167.6.5 requires a "petitioner in a CEQA action to name, as a real party in interest, any person who is identified as the applicant in the notice of determination." *Id.* (2) There was substantial evidence that the limited partner "had a direct interest in the project that gave rise to the litigation." The evidence suggested that the limited partner was the owner of the property to be benefited by the permit. *Id.* at 753.

V. Conclusion

California case law strongly suggests a party is not a real party in interest in a petition for writ of mandamus solely because they are *named* on a permit. A party is a real party in interest that should be named on a petition for writ of mandamus challenging a permit if they have a sole or shared property and/or business interest to be benefited by the permit. Generally, permit applicants must have either preceding interest in addition to their "interest" as an applicant to be considered a real party in interest.

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Writing Sample II

The following writing sample is an appellate brief I wrote for my Spring 2022 Lawyering II course. While the original brief had two issues, this sample will include only the issue of whether law enforcement officers intruded in a space in which the Defendant, Davina Day, had a reasonable expectation of privacy, and therefore conducted a privacy-based Fourth Amendment search. The cover page, table of contents, table of authorities, and the statement of the case have been removed, and only one issue presented and section of the argument has been included for brevity.

STATEMENT OF JURISDICTION

Appellant, Davina Day ("Day"), entered a conditional plea to a grand-jury indictment charging her with violation of the Federal Lacey Act, 16 U.S.C. § 3372(a)(1), and with conspiracy to violate the Lacey Act, 18 U.S.C. § 371 for possessing species protected by the Act. J.A. 1-4. Day filed a motion to suppress the evidence found in her apartment, and on February 1, 2022, the district court denied that motion. Day filed a timely notice of appeal on March 3, 2022. J.A. 45.

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 to review the final order of the district court.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the district court err as a matter of law in holding that the officers did not conduct a privacy-based search under the Fourth Amendment when they entered Day's apartment building without using a key or the intercom system and stood in the secluded alcove in front of her apartment to test a key fob on her door?

SUMMARY OF THE ARGUMENT

The Fourth Amendment provides "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The district court erred in holding that law enforcement did

not conduct a property or privacy-based Fourth Amendment search and in denying Day's motion to suppress.

Day had a reasonable expectation of privacy in the area around the sensor pad on her door, the area in front of her apartment, and the common areas of her apartment building because these areas were areas of limited access and Day took steps to maintain her privacy. In addition, the officers physically intruded upon Day's apartment by using the key fob, which is a super-sensory device, on Day's door.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998). Under a *de novo* standard, "an appellate court is obligated to reach conclusions independent of decisions reached by the courts below." *State v. Ortiz*, 600 N.W.2d 805, 813 (Neb. 1999). Findings of facts are given "great deference," and are only reversed if they "are against the manifest weight of the evidence." *People v. Bonilla*, 120 N.E.3d 930, 933 (Ill. 2018). In assessing "alleged violations of constitutional rights," an appellate court must evaluate a trial court's decision according to "the totality of the circumstances as shown by the entire record." *Breuer*, 577 N.W.2d at 44. Applying this standard

to the facts of this case, the district court erred in denying Day's motion to suppress.

II. THE DISTRICT COURT ERRED IN DENYING DAY'S MOTION TO SUPPRESS BECAUSE LAW ENFORCEMENT CONDUCTED AN UNREASONABLE FOURTH AMENDMENT SEARCH BY ENTERING DAY'S APARTMENT BUILDING AND TESTING THE KEY FOB ON HER DOOR.

A Fourth Amendment search occurs when an individual has a "subjective expectation of privacy" that is "objectively reasonable," and an intrusion into this area occurs. *Katz v. United States*, 389 U.S. 347, 358-59 (1967). The district court erred in denying Day's motion to suppress because the officers conducted an unreasonable Fourth Amendment search by violating Day's reasonable expectation of privacy in the area in front of her apartment and other areas within her apartment building and physically intruding on her home by using a super-sensory device.

A. The officers violated Day's reasonable expectation of privacy in the area in front of her apartment, and physically intruded upon her home.

Where an expectation of privacy is both subjectively held and "objectively reasonable," that expectation of privacy must be "protected by the Fourth Amendment." *United States v. Miravelles*, 250 F.3d 1328, 1331 (11th Cir. 2002). To determine if an expectation of privacy is objectively reasonable, many courts have considered whether an individual "had the right to exclude others from the place in question" and if they "had taken normal precautions to maintain [their]

privacy." *United States v. Trice*, 966 F.3d 506, 513 (6th Cir. 2020). In addition, a "device that is not in general public use" is used to "explore details of the home that would have previously been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Kyllo v. United States*, 533 U.S. 27, 40 (2001). The officers conducted a privacy search as they (A) violated Day's reasonable expectation of privacy in the sensor pad on her door, the area in front of her apartment, and other areas within her apartment building; and (B) physically intruded on her home through the use of a super sensory device on her door.

1. Day had a reasonable expectation of privacy in the area around the sensor pad on her door, the area in front of her apartment, and the common areas of her apartment building because these areas were limited in access and Day took steps to make maintain her privacy.

Day had a reasonable expectation of privacy in the area in the sensor pad on her door, the front of her apartment, and the common areas of her building because only tenants and approved guests were able to access her building and she took measures to maintain her privacy. An expectation of privacy is objectively reasonable where an individual has "the right to exclude others from the place in question" and has "taken normal precautions to maintain [their] privacy." *Trice*, 966 F.3d at 513.

Apartment tenants have an objectively reasonable expectation of privacy in their dwellings and the surrounding areas even where other tenants and their approved guests may pass through some of those areas. In *United States v. Whitaker*, police officers brought their drug-sniffing dog to sniff outside of the appellant's apartment door in a locked apartment hallway with at "least six apartments." 820 F.3d 849, 851 (7th Cir. 2016). The court held that the use of the drug-sniffing dog invaded the appellant's objectively reasonable expectation of privacy. *Id.* at 853-54. The court reasoned that although the appellant could not exclude other tenants and their guests from the common hallway, "that does not mean the police can park a sophisticated drug-sniffing dog outside an apartment door" without a warrant. *Id.*

Similar reasoning was adopted by the court in *United States v. Concepcion* where a police officer inserted the appellant's key in the lock on the appellant's door within an apartment building without a warrant. 942 F.2d 1170, 1173 (7th Cir. 1991). The court held that the officer violated the appellant's expectation of privacy in his lock such that a Fourth Amendment search occurred. *Id.* at 1773.

Where multi-unit dwellings lack protective measures to exclude others such as locks, intercoms, or enclosures, courts have held that tenants lack an objectively reasonable expectation of privacy. In *Trice*, police officers hide a camera in the hallway outside of the appellant's basement-level apartment in a two-level

building. 966 F.3d. at 510-11. The court held that the appellant did not have a reasonable expectation of privacy in the hallway outside of his apartment. *Id.* at 514-15. It emphasized that "there was no intercom system, doorbell, or any other way to alert tenants about the presence of a visitor" and that the appellant did not take measures to "maintain his privacy." *Id.*; *see also Miravelles*, 250 F.3d at 1331(reasoning that the appellant lacked a reasonable expectation of privacy in the common areas of their apartment building when it was accessible to "workers," "delivery people," and "the public at large").

Just like the appellant in *Whitaker* was justified in expecting that law enforcement would be excluded from the hallways of his apartment unless they had a warrant, Day was as justified in expecting that police officers testing a key fob on her door would not be permitted in her building without a warrant. This is true even if she could not exclude tenants and their permitted guests. Unlike the appellant in *Trice,* Day's apartment building had an intercom, a key fob lock system, and a backup manual lock all at the exterior entrance. In addition, residents in Day's apartment collected their mail at a "nearby mail center." While the appellant in *Miravelles* might have expected non-residents to be present in their building, Day had a reasonable expectation that individuals that were not tenants and approved guests would not be able to enter because of the locks, intercom system, and otherwise limited access. Further, unlike the appellant in *Trice*, Day

took measures to maintain her privacy such as selecting a third-floor apartment that was tucked away from the other units on her floor. In testing the key fob, the officers conducted a Fourth Amendment search on the sensor pad on Day's apartment door like the officers in *Concepcion* did. The officers violated Day's reasonable expectation of privacy in the area in the sensor pad on her door, the front of her apartment, and the common areas of her building by entering her building and testing the key fob on her door.

2. The officers physically intruded upon Day's apartment by using a super-sensory device on her door.

The key fob that the officers tested on the sensor pad on Day's apartment front door was a super-sensory device, which was a physical intrusion of Day's apartment. The use of "sense-enhancing technology" that is "not in general public use" to obtain information "regarding the interior of the home that could not have otherwise been obtained without physical 'intrusion into a constitutionally protected area" constitutes a "presumptively unconstitutional" Fourth Amendment search. *Kyllo*, 533 U.S. at 32-34 (quoting *Silverman v. United States*, 365 U.S. 505, 512 (2001)). This rule assures the "preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, 533 U.S. at 32-34.

Kyllo has established the majority rule that where a super-sensory device is used on the threshold of the home, there is an unreasonable Fourth Amendment

search. In that case, law enforcement officers used a thermal imaging device to detect heat from within the petitioner's home. *Id.* at 29-30. The Court held that this surveillance was an unreasonable Fourth Amendment search because the device was used to detect information "that would previously have been unknowable without physical intrusion." *Id.* at 40-41. Further, the Court rejected "a mechanical interpretation of the Fourth Amendment in *Katz*" that distinguishes between "off-the-wall" observations and "through-the-wall surveillance" because "that approach would leave the homeowner at the mercy of advancing technology." *Id.* at 35-36; *see also Whitaker*, 820 F.3d at 855 (holding that the rule of *Kyllo* "reasonably indicate[s]" that the use of a drug-sniffing dog without a warrant is an unreasonable Fourth Amendment search); *Jardines*, 569 U.S. at 11 (reasoning that where devices are used to "explore details of the home (including its curtilage), the antiquity of the tools they bring along is irrelevant"). The only notable challenges to this majority rule have been dissenting opinions by Supreme Court justices. *See Kyllo* 533 U.S. at 29 (Stevens, J., dissenting); *Jardines*, 569 U.S. at 18-21 (Alito, J., dissenting); *Katz*, 389 U.S. at 374 (Black, J., dissenting).

Much like the thermal imaging device used to detect heat from the inside of the petitioner's home in *Kyllo*, here the key fob was used by the officers to detect information "regarding the interior of the home." In addition, when Day accidentally dropped her key fob in the street, she did not intend to make it

available to the "general public." As made clear by the majority in *Kyllo*, a court may not consider whether a device extended into the home when determining whether physical intrusion occurred. The officers conducted a "presumptively unreasonable search" by using the key fob, a super-sensory device not intended to be available to the general public, to obtain information otherwise unknowable without physical intrusion into Day's home.

CONCLUSION

For the reasons stated above, the decision of the United States District Court for the District of Columbia must be reversed.

Respectfully submitted,

/s/ Hannah Klaus

Hannah Klaus
Assistant Federal Public Defender
625 Indiana Avenue, NW
Washington, DC 20004

Counsel for Appellant

April 4, 2022

Applicant Details

First Name	**Jacob**
Last Name	**Kornhauser**
Citizenship Status	**U. S. Citizen**
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Address	**Address** Street **2011 Magnolia Tree Lane** City **Durham** State/Territory **North Carolina** Zip **27703** Country **United States**
Contact Phone Number	**8153223914**

Applicant Education

BA/BS From	**University of Missouri**
Date of BA/BS	**May 2017**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 17, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Duke Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jacob Kornhauser
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The Honorable Judge Jamar K. Walker
United States District Court for the Eastern District of Virginia
Joseph E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am writing to express my strong interest in clerking for you for the 2024-25 term or any term thereafter. I highly value the opportunity to be among your first clerks on the federal bench. Additionally, my wife is from Washington, D.C. and I will return there to work, so being relatively close to her aging parents is important. I expect to receive my J.D. in May 2024 and am available to clerk after graduation.

The skills I learned in my first career as a broadcast journalist and as a published author have transferred well to law school and will make me a successful clerk. I have years of experience working on tight deadlines, collaborating with others, and communicating complex information in a digestible way.

I applied my skills in the legal context last summer while working under Jamie Lau at the Duke Wrongful Convictions Clinic. In this position I wrote several briefs from start to finish. One such brief earned our client's estate the statutory maximum for wrongful conviction compensation in a case of first impression.

I also have experience with academic research. I worked under Professor Buell, researching the pitfalls prosecutors faced in the white-collar criminal prosecutions stemming from the mortgage-backed securities, LIBOR, and Forex crises.

Attached please find my resume, Duke Law transcript, writing sample, and letters of recommendation from Professors Joseph Blocher, Brandon Garrett, Sam Buell, and Sarah Baker. I am happy to provide any additional information. I thank you for your consideration.

Best,

Jacob Kornhauser
Duke Law '24 J.D. Candidate

JACOB KORNHAUSER
2011 Magnolia Tree Lane, Durham, NC 27703
jacob.kornhauser@duke.edu | (815) 322-3914

EDUCATION

Duke University School of Law, Durham, NC
Juris Doctor expected, May 2024
GPA: **3.79**
Honors: *William R. Patterson Scholar*
Dean's Award (Evidence)
Activities: Research Editor, *Duke Law Journal*
Duke Wrongful Convictions Clinic

University of Missouri-Columbia, Columbia, MO
Bachelor of Arts in Broadcast Journalism, *magna cum laude*, May 2017
GPA: **3.79**
Honors: University of Missouri Honors College
Activities: Mentor with Big Brothers, Big Sisters
Volunteer Youth Sports Coach

PERSONAL INTERESTS

Baseball

Writing Non-Fiction

Hiking

Videography & Photography

Survivor (TV Show)

EXPERIENCE

Paul Hastings, Washington, D.C.
Summer Associate, May 2023 – August 2023

Professor Samuel Buell, Durham, NC
Research Assistant, May 2022 – Present
- Research and edit Prof. Buell's academic papers on individual white-collar prosecutions.

Professors Sarah Baker & Brandon Garrett, Durham, NC
Teaching Assistant, August 2022 – Present (Prof. Garrett Evidence in Fall 2023)
- Collaborate with professors, hold office hours, and grade student papers.

Duke Wrongful Convictions Clinic, Durham, NC
Clinic Associate, May 2022 – August 2022
- Wrote briefs, affidavits, and legal memos for supervising attorneys.
- Obtained $750,000 statutory award in a wrongful conviction compensation case of first impression.

FOX Sports, Los Angeles, CA
Associate Producer, May 2019 – August 2021
- Wrote and produced pieces for FOX Sports video franchises and top on-air talent.

KDRV-TV (ABC), Medford, OR
Reporter & Producer, May 2017 – March 2019
- Produced, anchored, and reported on live television, writing news copy on tight deadlines.

PUBLICATIONS

JACOB KORNHAUSER, THE CUP OF COFFEE CLUB: 11 PLAYERS AND THEIR BRUSH WITH BASEBALL HISTORY (Rowman & Littlefield 2020).

JACOB KORNHAUSER & DYLAN KORNHAUSER, MAX GORDON: LIFE, LOSS, & BASEBALL'S GREATEST COMEBACK (McFarland 2021).

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UNOFFICIAL TRANSCRIPT
DUKE UNIVERSITY SCHOOL OF LAW

2023 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Federal Habeas Corpus	Garrett, B.	4.1	2.00
State & Local Government	Miller, D.	4.0	3.00
Jury Decisionmaking	Bornstein, B.	4.0	2.00
Legal Ethics	Metzloff, T.	3.8	2.00
Administrative Law	Benjamin, S.	3.7	3.00
Corporate Diversity	Rosenblum, D.	*Credit Only*	1.00

2022 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Business Associations	Bloom Raskin, S.	4.2	4.00
Evidence	Garrett, B.	4.1	4.00
Criminal Procedure: Investigation	Grunwald, B.	3.5	3.00
Legal Writing: Craft & Style	Magat, J.	*Credit Only*	2.00
Cybercrime	Stansbury, S.	3.5	2.00

2022 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Constitutional Law	Blocher, J.	4.0	4.50
Criminal Law	Beale, S.	4.0	4.50
Legal Analysis, Research, Writing	Baker, S.	4.0	4.00
Property	Wiener, J.	3.7	4.00

2021 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Civil Procedure	Miller, D.	3.5	4.50
Contracts	Haagen, P.	3.5	4.50
Torts	Coleman, D.	3.2	4.50
Legal Analysis, Research, Writing	Baker, S.	*Credit Only*	0.00

TOTAL CREDITS: 58.50
CUMULATIVE GPA: **3.79**

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Jacob Kornhauser

Dear Judge Walker:

It is my pleasure to write this letter recommending Jacob Kornhauser for a clerkship in your chambers. Jacob has done very well at Duke Law, earning grades that put him on track for high Latin honors at graduation. Perhaps even more importantly, he has honed his research and writing skills in a variety of ways—from working in broadcast journalism to serving as Research Editor of the *Duke Law Journal*. He will be a very, very strong clerk.

I was fortunate to have Jacob in my Constitutional Law course in the spring of 2022. Because the course covered a wide range of doctrinal rules in addition to interpretive theories and historical context, I had a chance to observe and learn a lot about the students' skills and interests.

Especially given the backdrop of transitioning back to in-person classes in the aftermath of the pandemic's height, I was especially attuned to student participation, and Jacob distinguished himself throughout the semester. He is not a "gunner"—he doesn't jump to volunteer an answer every single question asked—but essentially served as the class's safety valve. He was mostly likely to raise his hand when no one else would. In other words, he took on the hardest questions, and did it well. He also regularly visited office hours, which I personally enjoyed because it gave us a chance to talk in more depth about the doctrine and also just chat about sports and other areas of mutual interest. I remember at one point when we'd been discussing the Dormant Commerce Clause, Jacob noticed a news story about how Oregon's assisted suicide law required that a person be a resident of the state—a requirement that raises a host of interesting constitutional questions.

Unsurprisingly, Jacob aced my exam, earning a 4.0. Most of the exam was a standard "issue spotter" requiring students to identify the strongest legal claims and explain how they should be evaluated. Jacob excelled at this—which is saying a lot, because there were ten distinct issues to address! —but also at the essay, which required students to evaluate doctrinal design and development. Jacob chose to write about *Wickard v. Filburn* and the development of Commerce Clause doctrine, and turned in a masterful analysis.

Looking at his transcript now, I see that the 4.0 in my class was one of *three* he earned that semester, and that over the past three terms the *majority* of his grades have been 4.0 or better—including in demanding upper-level courses like Business Associations (4.2) and Evidence (4.1, which was the highest grade in that class). His overall GPA of 3.79 is very strong—in line with that of many other Duke students who've gone on to highly competitive federal clerkships—but actually undersells his accomplishments, since it is weighted down by his first semester, in which he earned an overall 3.4. That is still above Duke's required 3.3 median, but his GPA since then is closer to an extraordinary 3.9. At his current trajectory, he will likely graduate with high Latin honors; take away the first semester and he could well be right at the top of his class (though Duke Law does not officially rank its students).

I would especially emphasize Jacob's 4.0 in the legal research and writing course, given the centrality of those skills to a law clerk's job. Jacob takes justifiable pride in his legal writing, and is always looking to further improve it. He wrote two nonfiction books prior to law school, and worked at media companies like ESPN and Fox Sports, where he had to wade through mountains of information and make them digestible, often in high-pressure situations and under strict time constraints. Again, those professional skills make him especially well-equipped for clerking. In fact, I have personally benefitted from Jacob's editing and insight, since he is one of the editors working on an article I have forthcoming in the *Duke Law Journal*. His suggestions, both as to substance and style, have been fantastic.

Jacob has been a wonderful student at Duke, and I am confident that he will be a great law clerk as well. Please do not hesitate to contact me if you have any questions about him.

Sincerely,

Joseph Blocher
Lanty L. Smith '67 Professor of Law

Joseph Blocher - Blocher@law.duke.edu - (919) 613-7018

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 9, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Jacob Kornhauser

Dear Judge Walker:

I write to recommend Jacob Kornhauser, who has applied for a clerkship in your chambers. I do so with high enthusiasm.

Although Jacob has not yet been a student in one of my courses at Duke Law, I know him well from his extensive research assistant work for me during the summer and fall of 2022. As a first-year student, Jacob came to me to seek out the position based on his interest in my field of research, which is corporate and white-collar crime and government enforcement. I ended up delighted and lucky to have hired him.

Jacob is an academic performer of the highest rank, with outstanding legal skills. His grades have been impressively high across a variety of core, demanding courses, especially as he has progressed over his first two years at Duke.

As a research assistant, Jacob has been uniformly mature, industrious, and self-directed in solving problems. His work for me primarily involved two major projects. First, for a paper examining individual prosecutions in substantial scandals in the financial markets between 2010 and 2020, Jacob collected comprehensive data on over 100 criminal and civil enforcement actions in the United States and United Kingdom. He then organized that data into a beautiful set of appendices and tables. Peer readers of the resulting paper have noted the quality and usefulness of the data and its presentation. For this project, Jacob also provided invaluable assistance in expanding, editing, and cite-checking hundreds of complicated footnotes. I could not have managed these important aspects of this project without Jacob's contributions.

Second, Jacob captained the editing and production of the second edition of my textbook, *Corporate Crime: An Introduction to the Law and its Enforcement*. This is a two-volume text covering dozens of topics in the field. I have chosen to self-publish it in bound form through Amazon's platform and make it available free for download on my website, buelloncorporatecrime.com. The process of revising the manuscript each year, producing the final book through Amazon's process, and revising the website is time-consuming and technically complex. I count on having a proficient and agile research assistant to carry the project to completion. Jacob was excellent in this role, and I am proud of the final product, which could not have been realized without his guiding hand.

I have been particularly impressed during these projects by Jacob's professionalism and dispatch in communicating clearly and frequently about his progress, his understanding of tasks, and his expectations about completion. At times, I have had to urge him to slow down and not feel that he is expected always to turn things around without delay. Jacob's diligence is beyond question.

Having spent ten years in the federal courts before teaching, as a law clerk and as a prosecutor in several districts and circuits, and having taught and mentored thousands of law students, I am confident in predicting that Jacob Kornhauser would be an excellent hire for any judge with a demanding docket and a chambers that values professionalism and collaboration. I am happy to assist you further in any way with your evaluation of his application.

Sincerely yours,

Samuel W. Buell
Bernard M. Fishman Professor of Law

Sam Buell - buell@law.duke.edu - 919-613-7193

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 9, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Jacob Kornhauser

Dear Judge Walker:

I write to recommend Jacob Kornhauser for a judicial clerkship in your chambers. He has an extremely strong record at Duke Law. The curve at Duke Law is extremely demanding, and the grading more fine-grained than at other top law schools. Jacob is warm, collegial, a superlative writer, who relishes complex areas of legal doctrine, and has a deep commitment to public interest work. He would be such a delight in chambers; I recommend Jacob in the strongest possible terms.

I first came to know Jacob in my evidence course in fall 2022. Jacob wrote one of the best exams in the course, and received an "A+"-level 4.1 grade in a very competitive class, a grade that I have only awarded a handful of times in all of my years at Duke Law School. Jacob won the Dean's award for his work in the class. I was not surprised at this performance. Jacob asked excellent questions throughout the course and was easily one of the most engaged students in a quite large course. Jacob was clearly very engaged with specialized issues regarding scientific evidence and legal ethics during the course. This spring, Jacob was enrolled in my federal habeas corpus course. Jacob consistently, again, asked some of the most challenging questions and was an active participant. It was a small class, of just nine students, engaged with some of the most difficult statutory and judicial doctrines, and I had a chance to get to know each of the students extremely well. My appreciation for Jacob's depth as a legal thinker and problem solver only grew, as I saw him relish the challenges of unpacking habeas corpus doctrines.

I have also read and offered comments on Jacob's draft student note examining the implications of the Supreme Court's ruling in Shinn v. Ramirez. It is an extremely complex area, even within federal habeas doctrine. The piece is excellent, makes a very useful contribution, and I trust that the law review will publish it when it is submitted. Returning the favor, Jacob was the assigned editor to a law review article that I have co-authored with Joseph Blocher and that Duke Law Journal is publishing. Jacob's suggested edits on that manuscript were some of the most helpful that we received, from any readers.

Jacob has done a range of other impressive research and public interest work at Duke Law, ranging widely from his work on Duke Law Journal, summer work at Paul Hastings, to work in the Wrongful Convictions Clinic. Jacob is a fine writer; he was a teaching assistant in the legal writing program, has even published two nonfiction books on sports, relating to his work in sports journalism before law school. This wide-ranging experience has added a level of maturity to Jacob's work.

In short, Jacob is an academically gifted student, a quick study, a very strong writer, and a very warm and personable communicator. Jacob is balanced, collegial, creative, hardworking, and would be a great asset in chambers. Please feel free to contact me at (919) 613-7090 if you would like to discuss his application, and I thank you for considering it.

Very truly yours,

Brandon L. Garrett
L. Neil Williams, Jr. Professor of Law and
Director, Wilson Center for Science and Justice

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 9, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Jacob Kornhauser

Dear Judge Walker:

I am writing to offer my highest recommendation for Jacob Kornhauser to serve as one of your law clerks. Jacob was a student in my legal writing course last year, a class which at Duke spans the entirety of the first year. This year, I've had the pleasure of working with Jacob as one of my two teaching assistants for the course.

The group of first year students I taught last year is the most outstanding group I have ever taught at Duke, and Jacob was the one of two students from that group that I chose to hire as a TA. That speaks to his writing skills, but it also reflects his personality.

Jacob has an interesting professional background that distinguishes him from other students. Before law school, he was a sports reporter, even publishing two books, both focusing on baseball. My experience teaching has been that students who work in some fashion before law school make better students and TAs, and this would also make him an excellent clerk. He is mature, seasoned, and persistent—all things that would be beneficial in a judge's chambers.

As one of my TAs this year, Jacob has been instrumental in acting as a mentor and teaching my students the Bluebook. The students respond very well to him and I have been impressed with his judgment and patience in interactions with them. As you are surely aware, first year law students can be a high-strung, challenging group with which to interact.

Jacob has all the intellectual skills needed to be an outstanding clerk, but he would also be a wonderful, collegial addition to chambers. His recent election to the position of Research Editor on Duke's law review further reflects this, as his fellow classmates chose him for this position which requires sensitivity and great attention to detail.

Please let me know if I can provide any further information in support of Jacob's application. He is an outstanding student and strong clerkship candidate.

Sincerely yours,

Sarah C. W. Baker
Clinical Professor of Law

Sarah Baker - baker@law.duke.edu - 919-613-7039

NORTH CAROLINA INDUSTRIAL COMMISSION
I.C. FILE NUMBER: EC-00044

IN THE MATTER OF CHARLES RAY FINCH

REPLY BRIEF IN SUPPORT OF COMPENSATION FOR THE ESTATE OF CHARLES RAY FINCH

ARGUMENT

The arguments advanced in the State's response brief fail to establish the inability of Charles Ray Finch's estate to collect his § 148-82 statutory award. First, the § 28A-18-1 holding in *Estate of Jacobs v. State*, 775 S.E.2d 873 (2015), is not dicta, and even if it was, it still indicates a North Carolina appellate court would find Mr. Finch's claim survives to his estate. Second, § 148-82 *et seq.* and § 28A-18-1 can be harmonized because there is no conflict between them, and case law rejects classifying $750,000 compensation as nugatory. Third, other state compensation programs containing their own survival provisions do not impute legislative intent onto § 148-82 *et seq.*, which does not contain such a provision. In sum, because the State's arguments do not support the assertion that Mr. Finch's estate is incapable of collecting his $750,000 statutory award, this Commission should find that Mr. Finch's § 148-82 *et seq.* claim survives to his estate.

A. The *Jacobs* 28A-18-1 holding is not dicta, and, even if it was, it still indicates our State appellate court would find Mr. Finch's claim survives to his estate.

The State argues we should ignore the *Jacobs* § 28A-18-1 holding as dicta, disregarding the fact that the case could not have been properly adjudicated without reaching that issue.[1] In *Jacobs*, the estates pursued two potential avenues for obtaining relief: (1) under § 148-82 *et seq.* directly; and (2) under § 28A-18-1 as survivors to the decedents' claim. *Jacobs*, 775 S.E.2d at 874. The two avenues for relief operated as alternative arguments. They argued they could bring § 148-82 *et seq.* claims directly on the basis of a posthumous pardon and that, even if they could not, the claim would survive to them under § 28A-18-1. In other words, the *Jacobs* court was tasked with answering whether a posthumous pardon triggers a cause of action in an estate under § 148-82 *et seq.* and *also* whether a § 148-82 *et seq.* claim based on a posthumous pardon could survive to an estate under § 28A-18-1. They answered both questions in the negative, but for separate reasons – the answer to the § 148-82 *et seq.* argument did not answer or render the argument under § 28A-18-1 moot.

The *Jacobs* court first held that testamentary estates are not a "person" or "claimant," and thus, do not qualify for § 148-82 *et seq.* relief based on a posthumous pardon. *Id.* at 876–77. Put another way: the issuance of a posthumous pardon does not trigger a cause of action in an estate itself because it is not a "person" or "claimant." With that, the *Jacobs* court turned to the estates' second argument – that, if they could not bring the cause of action on their own, the claim survived under § 28A-18-1. *Id.* at 877. Again, the court disagreed, recognizing that a claim under § 148-82 *et seq.* only accrues upon the issuance of a pardon of innocence, and thus, a posthumous pardon

[1] The *Jacobs* court itself makes clear at the outset that, the Full Commission made three findings when it denied the estates' claim, including that "because claims under section 148–82 *et seq.* accrue by the issuance of a pardon of innocence, and [none of the decedents] received a pardon of innocence prior to their respective deaths, no claims for remuneration survived to their personal representatives under . . . § 28A-18-1." 775 S.E.2d at 874. As discussed below, this confirms that the § 28A-18-1 inquiry was a separate and necessary aspect of the *Jacobs* appellate decision.

would not enable the claim to survive because it did not accrue during the decedent's lifetime.[2] *Id.* Both holdings were essential to adjudicating the estates' claim. The first holding said that testamentary estates could not bring § 148-82 *et seq.* claims as a "person" or "claimant" in the first instance while the second holding said that, on the basis of a posthumous pardon, the estates also could not bring such claims under § 28A-18-1 because the overarching claim never accrued. In isolation, neither holding fully determined whether the estates had a path to obtaining statutory relief under § 148-82 *et seq.* for a posthumous pardon. But, together, the holdings established that when pursuing a claim based on a posthumous pardon, an estate both may not bring a § 148-82 *et seq.* claim directly in the first instance *and* that, because the claim never accrued, § 28A-18-1 is also not an available avenue in obtaining statutory relief.

Even if this Commission finds the *Jacobs* § 28A-18-1 holding is dicta, the opinion is still useful because it provides insight into how our appellate court would adjudicate the instant dispute. As the State aptly observes in its brief, the analysis in *Jacobs* "seems to insinuate that had an individual been eligible to receive compensation under the Act prior to his or her passing, as is the case here, then the petition would survive to his or her estate[.]" State's Response Brief at 7–8. Precisely. To avoid this inconvenient reality, the State argues that to hold accordingly would betray the internal logic of the opinion that a testamentary estate cannot be a "person" or "claimant" under 148-82 *et seq.* But the finding that a testamentary estate cannot be a "person" or "claimant" under

[2] The *Jacobs* court makes clear that the timing of § 148-82 *et seq.* accrual, not final Commission adjudication, is important to the survival of a claim. In characterizing the background facts, the court's description of the six living members of the Wilmington Ten is enlightening. The court notes that the six members of the Wilmington Ten "who were alive *when their petitions were filed*" were fully compensated, as opposed to characterizing them as the six members "who were alive *when their cases were adjudicated.*" 775 S.E.2d at 874 (emphasis added). That is because their clams had already accrued by issuance of an *inter vivos* pardon of innocence, something the *Jacobs* court recognized. *See id.* (detailing the *Jacobs* Full Commission's conclusion that § 148-82 *et seq.* claims accrue upon issuance of a pardon of innocence). Thus, the *Jacobs* court established that whether someone was alive *when a pardon of innocence was issued* is the determinative factor in such disputes, not whether someone was alive when the Commission reviewed their claim.

§ 148-82 *et seq.* was in the context of a decedent who was posthumously pardoned, not one, as here, who was pardoned and petitioned for compensation *inter vivos*. Mr. Finch was the "person" and "claimant" of this claim during his lifetime and, as detailed in the Estate's Brief in this case, under the plain language of § 28A-18-1, and as indicated by the *Jacobs*' opinion, when a plaintiff is pardoned and petitions for compensation *inter vivos*, the claim survives to the decedent's estate.

B. Harrell v. Bowen is irrelevant to the case at bar, and the State fails to cite a single case where a plaintiff's monetary compensation is considered nugatory.

The State repackages and duplicates its "nugatory" argument in its discussion of *Harrell v. Bowen,* 655 S.E.2d 350 (N.C. 2008), an inapplicable case that the State concedes is "not on point with the instant conundrum." State's Response Brief at 10. Yet, undeterred, the State still relies on *Harrell* to assert three propositions: (1) even when demands and claims accrue, not all of them survive to the estate under § 28A-18-1; (2) § 28A-18-1(b) is not an exclusive list of claims which do not survive; and (3) the overarching statute controls over § 28A-18-1 when there is an implicit conflict between the two. Each proposition is flawed in its reliance on *Harrell*. The case at bar is not analogous to *Harrell* and the State strains and stretches to try and make it applicable.

First, we already know that not all claims which accrue prior to death survive to the decedent's estate. Section 28A-18-1(b) explicitly provides that causes of action for: (1) libel or slander (except slander of title); (2) false imprisonment; and (3) where the relief sought could not be enjoyed, or granting it would be nugatory, all do not survive. Mr. Finch's estate has never asserted that *all* claims survive to the decedent's estate under § 28A-18-1, just that *this* claim does.

Second, *Harrell* does not tell us that § 28A-18-1(b) is not an exclusive list. In fact, *Harrell* does not tell us a single thing about the § 28A-18-1(b) exceptions because those exceptions only apply to claims *in favor of* a decedent. Of course, in *Harrell*, the claim is *against* a decedent. Thus, *Harrell* does not in any way indicate that there are types of claims beyond the scope of § 28A-18-

1(b) which would apply to this case and keep Mr. Finch's estate from collecting his statutory award. All the *Harrell* court held was that § 28A-18-1 does not apply to punitive damages applied against a decedent. 655 S.E.2d at 353. The court found that the legislative intent in N.C.G.S. § 1D-1, the punitive damages statute, was to deter "egregiously wrongful acts" of the defendant and others and because a deceased defendant cannot be deterred from committing wrongful acts, the court held an estate could not be liable for punitive damages. *Id.* Accordingly, although the holding in *Harrell* is still not directly applicable (because § 28A-18-1(b) exceptions apply only to claims *in favor of* a decedent), the court's opinion fits logically within the § 28A-18-1(b)(3) nugatory exception — when the point of adjudication, relief, or deterrence is rendered moot by death, such as where punitive damages cannot deter someone who is dead, the court is not going to allow survival under § 28A-18-1.

Third, whether an overarching statute controls when in conflict with § 28A-18-1 is irrelevant here because § 148-82 *et seq.* and § 28A-18-1 are not in conflict. The *Harrell* court concluded that because § 1D-1 specifically says that it "prevails over any other law to the contrary," the plaintiffs could not sue the estate for punitive damages under § 28A-18-1. *Id.* The court's opinion adds nothing to this case where there are no claims for punitive damages and where the overarching statute, § 148-82 *et seq.*, contains no provisions indicating that it would "prevail" over § 28A-18-1.

The State also argues – without any case law support – that even if Mr. Finch's § 148-82 *et seq.* claim survived to his estate under § 28A-18-1, the $750,000 compensation would be nugatory. Its only attempt at bolstering this unsupportable position is the feeble assertion that Mr. Finch's estate "assumes that an action can never be 'nugatory' solely based on the fact that there is money at stake." State's Response Brief at 12. Mr. Finch's estate knows better than to assume.

The estate is well aware that some actions may be nugatory, as it acknowledged at oral argument and in its opening brief. But based on a thorough review of North Carolina court precedent, the estate asserts that the present claim for $750,000 compensation for wrongful incarceration is not nugatory because it is unquestionably most akin to the claims which North Carolina courts have found survive against the nugatory exception. *See* Estate's Brief, Section B at 6–8 (comparing *Elmore v. Elmore*, 313 S.E.2d 904 (N.C. App. 1984) and *In Re Higgins*, 587 S.E.2d 77 (N.C. App. 2003) with *Schronce v. Coniglio*, 476 S.E.2d 366 (N.C. App. 1996) and *McGowen v. Rental Tool Co.*, 428 S.E.2d 275 (N.C. App. 1993)). The State cannot and does not cite a single case which says that the estate of a decedent entitled to monetary compensation may not collect said compensation because it is nugatory.

C. Specific survival provisions within the State's cited compensation programs are not surplusage in light of § 28A-18-1 and are different in kind from § 148-82 *et seq.*

The State's reliance on the Childhood Vaccine-Related Injury Compensation Program ("Vaccine Program") and the 2013-15 Eugenics Asexualization and Sterilization Compensation Program ("Eugenics Program") is misplaced, as the underlying purpose of each of those compensation programs is fundamentally distinct from 148-82 *et seq.* Because those programs contain their own survival provisions, the argument goes, applying § 28A-18-1 to them would be surplusage. Accordingly, the State asserts that § 28A-18-1 must not apply to any compensation program, regardless of the context of any particular program. But context is key. And the State ignores that, unlike here, both of the cited statutory frameworks necessarily had to account for the likelihood of death, so much so that it made sense for the legislature to include survival provisions within the text of statutes.

It makes sense why each of the State's two cited programs would include a survival provision. The Vaccine Program specifies that "in the case of a decedent, the claim may be filed